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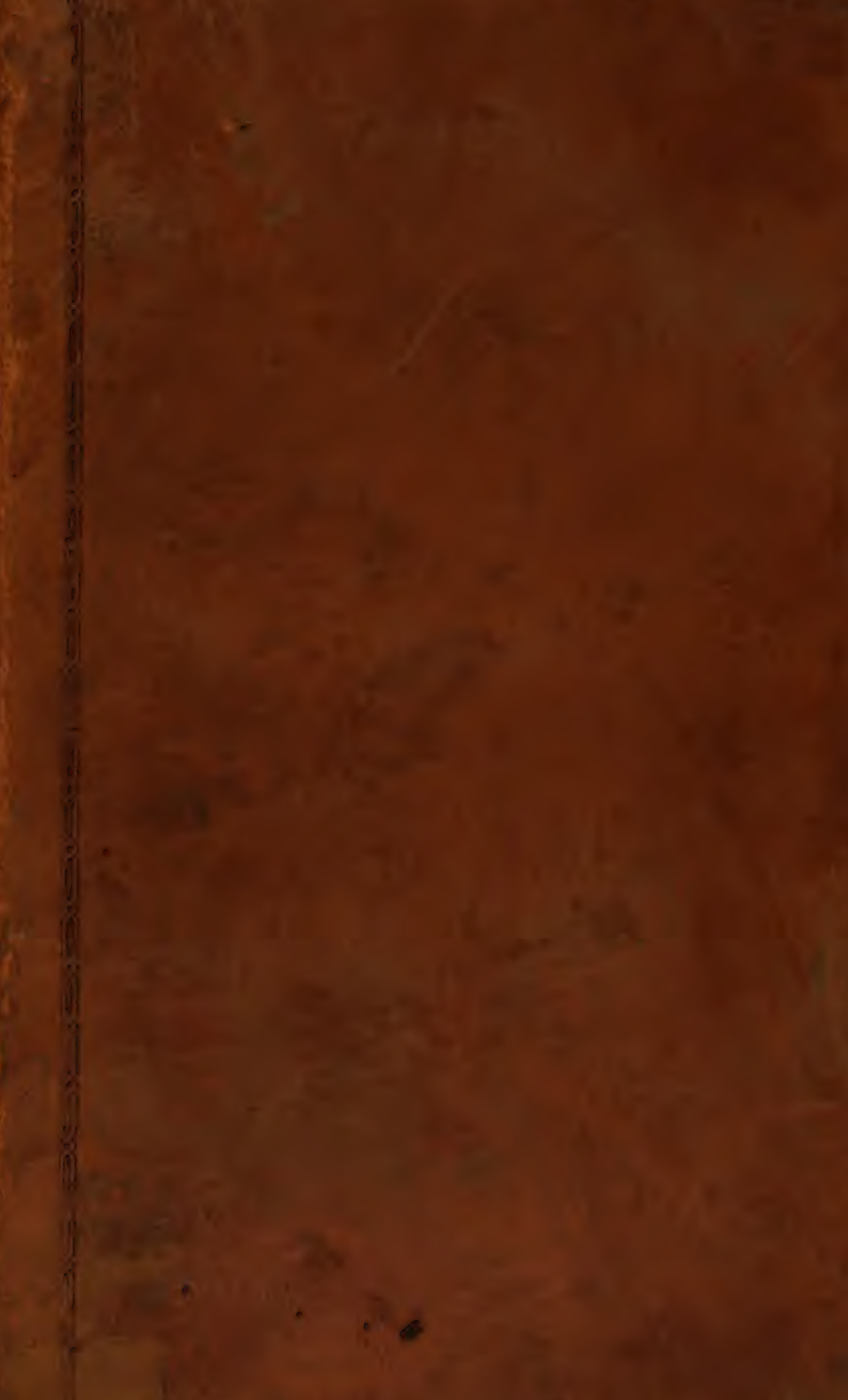
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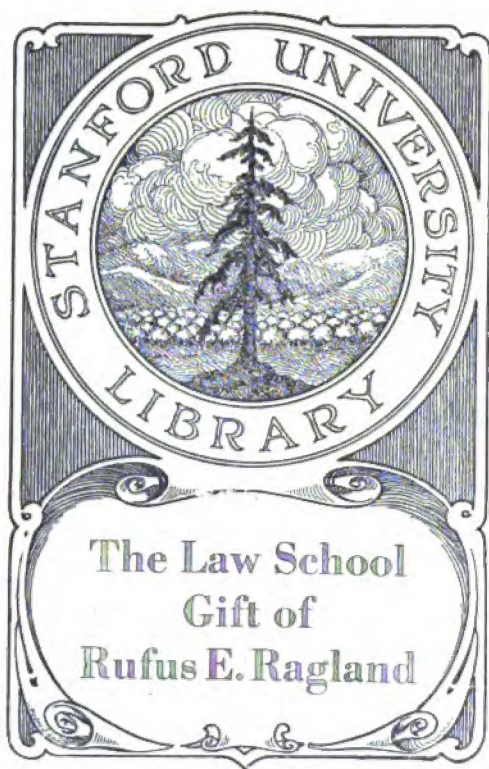
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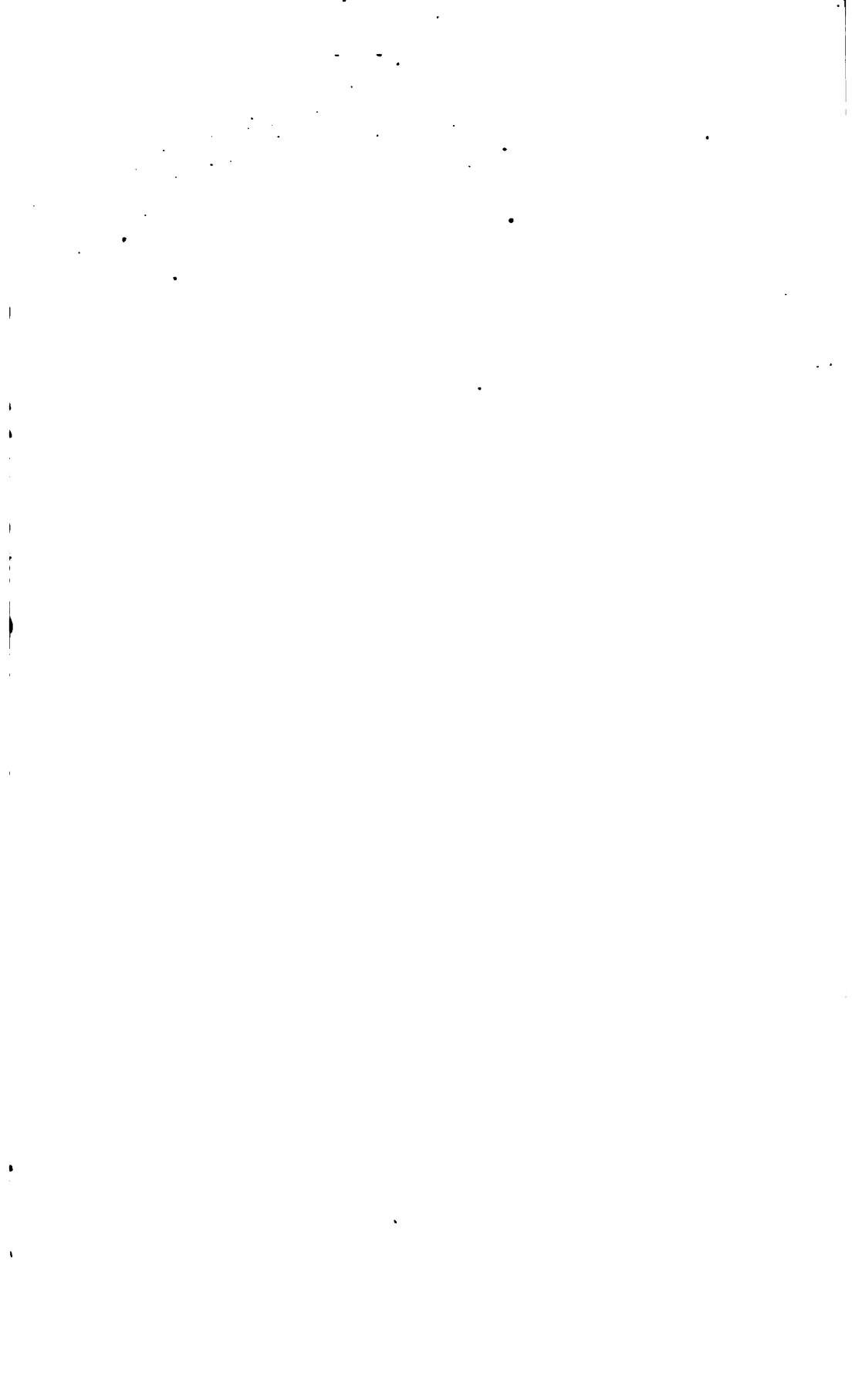




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**REPORTS**  
**OF**  
**CASES**  
**DECIDED IN THE**  
**HIGH COURT OF CHANCERY,**

**BY**  
**THE RIGHT HON. SIR JOHN LEACH,**  
**VICE-CHANCELLOR OF ENGLAND.**

---

**BY NICHOLAS SIMONS AND JOHN STUART,**  
**OF LINCOLN'S INN, ESQUIRES, BARRISTERS AT LAW.**

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**WITH NOTES AND REFERENCES,**  
**TO BOTH ENGLISH AND AMERICAN DECISIONS;**

**BY JOHN A. DUNLAP,**  
**COUNSELLOR AT LAW.**

**VOL. I.**  
**1822, 1823, 1824—2, 3, & 4 Geo. IV.**

**NEW-YORK:**  
**PUBLISHED BY GOULD, BANKS & Co.**  
**LAW BOOKSELLERS, NO. 144 NASSAU STREET;**  
**AND BY WM. & A. GOULD & Co.**  
**NO. 104 STATE STREET, ALBANY.**

**1843.**

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ATTORNEYS GENERAL.

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SOLICITORS GENERAL.

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## MEMORANDUM.

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The decisions in the following cases contained in this volume have been appealed from, and the results are as follow :—

Balfour v. Farquharson, post, 73	- - - -	Affirmed, 1 Turn. 184.
Verlander v. Codd, - — 94	- - - -	Affirmed, ibid. 94.
Head v. Head, - - - — 150	- - - -	Affirmed, ibid. 138.
Adamson v. Hull, - - — 249	- - - -	Reversed, ibid. 258.
Trim v. Baker, - - - — 469	- - - -	Affirmed, ibid. 253.
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# CASES IN CHANCERY.

BEFORE

## THE VICE-CHANCELLOR.

\*PRANKERD v. PRANKERD.

[\*1]

1890, 17th March.—*Advancement.*

A tenant in possession of copyholds, grantable for lives, procured, at his own expense, a grant of it to his son in remainder, and at the same time surrendered it to the use of his will: Held, that the son was not entitled to the estates so granted to him by way of advancement, but was a trustee for his father.

By the custom of the manor of Bleadon with Priddie, in the county of Somerset, copyhold lands, held of the manor, are granted to four persons for their lives successively, as they are named in the grant; and the grantee in possession is enabled, by surrendering all his estate in possession, reversion and remainder, to pass his own estate, and also the estates in reversion or remainder expectant thereupon.

In the year 1794, the plaintiff was seized in possession of a copyhold estate held of this manor, for his life; and his two daughters, Mary Prankerd and Louisa Prankerd, were seized of the same estate for their lives in remainder successively.

The defendant was the son of the plaintiff; and, at a court held in December 1794, the plaintiff procured \*a grant of the estate to be made [\*2] to the defendant for his life, in remainder expectant upon the determination of the estates of the plaintiff and his two daughters, and paid to the lord the fine of 130*l.* for this grant; and, at the same court, he surrendered all his estate and interest in the premises, during his own life, and the lives of his two daughters, and the defendant to the use of his will.

The plaintiff's daughters having died, the defendant claimed, under this grant, to be entitled to the premises upon the determination of the plaintiff's estate, for his own use, by way of advancement made to him by the plaintiff, his father.

In consequence of this claim this suit was instituted, for the purpose of having it declared by the court, that the defendant held the premises under the

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1831.—Turner and others v. Robinson and others.

---

grant, in trust for the plaintiff, and of having a declaration of trust executed by him to that effect.

Mr. *Bell* and Mr. *Sidmou*, for the plaintiff, said it was now settled, that if a father purchases an estate in the name of a child, it is, *prima facie*, an advancement for the child; but that, if the father, at the time of the grant, does any act, showing that he meant the purchase to be for his own benefit, the child would be a trustee for the father; [1] and they contended that the surrender in this case, made by the plaintiff to the use of his will, was a sufficient declaration of such intention; and they cited, *Dyer v. Dyer*, (a,) *Finch v. Finch* (b,) and *Murless v. Franklin* (c.)

[\*3] \*Mr. *Heald*, and Mr. *Bickersteth*, for the defendant.

The *Vice-Chancellor* said, that as the plaintiff had surrendered the estate to the use of his will, it was clear he meant it to remain at his own disposal, and not to be an advancement for the defendant; [2] and that, as the surrender was contemporaneous with the grant, the defendant ought to be declared a trustee of the interest which he took under the grant, for the plaintiff; and he decreed accordingly; but refused to give the plaintiff his costs. [3]

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#### TURNER and others v. ROBINSON and others

1831, 27th March.—*Plea*.

A *Plea* of bankruptcy is good notwithstanding the commission issued after the filing of the bill. Matters which arise after the filing of the bill may be pleaded; by analogy to the rule of law.

In Trinity term 1820, the plaintiffs being entitled to certain shares of the residuary personal estate of William Woolcott, deceased, filed their bill against

(a) 2 Cox, 92; and 2 Wats. Copyh. 216.

(b) 15 Ves. 43.

(c) 1 Swanst. 13.

[1] Vide, *Jackson v. Metdsorf*, 11 Johns. Rep. 91.

[2] "Where property is purchased by a parent in the name of his child, the purchase is *prima facie* to be deemed an advancement; the resulting or implied trust which arises in favor of the person who pays the purchase money, and takes a conveyance or transfer in the name of a stranger, does not arise in the case of a purchase by a parent in the name of a child; but still the relation of parent and child is only evidence of the intention of the parent to advance the child, and that evidence may be rebutted by other evidence, manifesting an intention that the child shall take as a trustee; and in this case, as in most others of the like kind, the only question is, whether there is such other evidence. That contemporaneous acts and even contemporaneous declarations of the parent may amount to such evidence has often been decided. Subsequent acts and declarations of the parent are not evidence to support the trust, although subsequent acts and declarations of the child may be so: but generally speaking we are to look at what was said and done at the time." Lord Langdale M. R. in *Sidmouth v. Sidmouth*, 2 Beav. 447. In that case, moneys were invested in the funds by a father in the name of his son, the dividends of which were received by the father during his life, under a power of attorney from the son: it was held, that this was an advancement, and that the funds belonged to the son. For the American cases on the subject of advancement, vide Amer. Ch. Dig. Distribution IV.

[3] Where each party must pay his own costs, vide Amer. Ch. Dig. Practice XIX.

1892.—James v. Sadgrove.

his personal representatives, and the other residuary legatees, for an account of personal estate, and to have their shares of the residue ascertained and paid.

On the 28th of September 1890, a commission of bankrupt issued against Charles Frederick Woolcott, one of the residuary legatees, and one of the defendants in this case.

He therefore pleaded his bankruptcy.

Mr. Roots, for the plaintiffs, insisted that the plea was bad, because the bankruptcy took place after the bill had been filed.

\*Mr. Simons, for the defendant, replied that it was no objection to a [\*4] plea that the matter pleaded had occurred after the filing of the bill; and that a release of the subject of the suit, though it was executed after the filing of the bill, might be pleaded to the bill.

The Vice-Chancellor said, that where the decree sought is *ad rem*, and not a personal demand, the bankruptcy of the defendant is a good plea, because all interest in the subject is transferred from the bankrupt to his assignees; and that as any matter which arises between the declaration and plea may be pleaded at law, so matters which arise between the bill and plea may be pleaded in equity.

Plea allowed. [1]

# JAMES v. SADGROVE.

1892, 2d & 4th November.—*Plea and Answer.*

Plea to all the relief, and all the discovery, except certain interrogatories, accompanied with an answer to these interrogatories, which did not go to any material point, overruled.

*Aliter*, if the answer had been to matter which would have repelled the defence by plea.

Where there is matter charged by the bill which goes to repel the defence by plea, the plea must be supported by an answer to that matter.

The bill stated, that John Norman and Thomas Humphrey, deceased, were in 1818 joint owners of a ship: that, on the 2d of March 1818, a settlement of accounts relating to this ship took place between them, when a balance of £511. 6s. 6d. was found due from Humphrey to Norman, and in order to pay that balance, three bills of exchange, all dated the 2d of March, were drawn

[1] The recent bankrupt law of the United States, § 4 provides that the discharge and certificate "shall be, and may be pleaded, as a full and complete bar to all suits brought in any court of judicature whatever." The act does not, in express terms, allow the discharge to be pleaded *pro discharge*; but if such construction be not given, the intention of the law would in innumerable instances be frustrated. Vide *Banker v. Ash*, 9 Johns. Rep. 250. *Morgan v. Dyer*, ib. 255. 8 C. 10 Johns. Rep. 161. *Merchants Bank v. Moore*, 2 Johns. Rep. 294. A discharge under an insolvent law, has been allowed to be pleaded, even after verdict. *Mechanics Bank v. Howard*, 8 Johns. Rep. 302. See further, *Mackworth v. Marshall*, 3 Simons, 368. Matter arising subsequently to the filing of the bill may be set forth in the answer. *Lyon v. Brooks*, 2 Edw. 110.



1892.—James v. Sadgrove.

upon Humphrey by Norman, and accepted by the former ; the first payable two months, the second five months, and the third six months after date : that the first was paid when due, but before the second and third became due Humphrey died : that Humphrey made his will, dated the 5th of July 1813, [\*5] and appointed Driver and Sadgrove \*his executors : that on the 30th of July, Sadgrove alone proved the will, and possessed the personal estate ; " that when the second and third bills became due, they were presented for payment by Norman, who was informed by Sadgrove that he had no assets of the testator in his hands, and that he could not pay the bills : that Norman waited for some time in expectation that Sadgrove might possess assets to enable him to pay these two bills, but he was unable to discover that Sadgrove was in possession of such assets ; and that Norman (who was master of a merchant vessel trading to foreign parts) left this country, and was chiefly in foreign parts beyond sea, until the year 1820."

The bill prayed an account of the personal estate possessed by Sadgrove, and that it might be applied in a course of administration.

To this bill the defendant Sadgrove put in a plea and answer. The plea was expressed as follows : " To all the discovery and relief sought for or prayed against this defendant, except such parts of the said bill as seek a discovery, whether," &c. It then set forth the interrogatories to those statements in the bill which are included in inverted commas ; after which came the plea of the statute of limitations in the usual manner ; and then followed an answer to the excepted interrogatories.

Mr. Lovat, in support of this plea, contended that, although it was settled that a plea to relief covers the discovery, a defendant might, if he pleased, give the discovery and plead to the relief without overruling his plea. [\*6] *Hodgkin v. Longden* (a) ; *Todd v. Gee* (b). \*A fortiori, if he expressly save to himself the right of answering a particular part of the bill he does not overrule his plea.

Mr. Parker, contra.

The Vice-Chancellor :—The authorities cited do not touch the present case. Admitting that a defendant may at his pleasure answer the whole Bill, though he pleads to the relief, it does not follow from thence that he may plead to the relief and to a part of the discovery only, and at his pleasure answer the rest of the bill. Such a partial answer can serve no useful purpose ; and the rule applies here, that he who submits to answer at all, must answer fully. If the statute protects the defendant from a part of the discovery, it protects him from the whole discovery, and the partial answer overrules the plea (c.)

The Vice-Chancellor, referring to this case, said there were possible cases

(a) 2 Ves. jun. 2.

(b) 17 Ves. 274 & 277.

(c) *Blacket v. Langlands*, 1 Anstr. 14, seems to have been decided on the same principle with this case, but is imperfectly reported. See also *Morrison v. Turmear*, 18 Ves. 175 ; *Moscard v. Duppa*, 1 V & B. 511 ; *Bowers v. Cater*, 4 Ves. 91 ; *Bayley v. Adams*, 6 Ves. 586, &c.

1892 — *Beckford v. Kemble and others.*

in which a plea to the relief and a part of the discovery might be supported: that if, for instance, facts were stated in a bill for the purpose of taking the case out of the statute of limitations, the defendant would be bound to answer as to such facts, though he pleaded to the relief and the rest of the discovery; [1] but that such was not the nature of the case in question. (d)

\**SUSANNAH HYDE BECKFORD v. KEMBLE and others.*

[\*7]

1822, 4th November. — *Jurisdiction.*

Injunction (on terms) granted to restrain mortgagees of a West India estate from proceeding on a bill of foreclosure in the colonial court, ~~and~~ after a decree made in this court, which directed an inquiry to ascertain the amount of the mortgage debt, on a bill to redeem; all parties being in this country.

Query, whether the mortgagee of a Jamaica estate, on a bill of foreclosure in this court, is entitled to a decree for sale of the estate, according to the laws of the colony?

The court was moved, on behalf of the plaintiff, for an injunction to restrain the defendants, Atkins, Mavor, and Samuda, from all proceedings in a suit instituted by them in the court of chancery, in Jamaica, against the plaintiff; and from all other proceedings in the said court against the plaintiff, for foreclosure and sale of the plantations and premises in question in this cause.

The ground of this application was, that these defendants had instituted the suit for foreclosure in the colonial court, after the decree in this cause, which directed certain accounts to be taken, for the purpose of ascertaining the amount of the mortgage debts, with a view to redemption.

In the month of June, 1818, the plaintiff filed her original bill in this cause, which prayed, amongst other things, that accounts might be taken, in order to ascertain how much was justly due on the mortgages, and that the plaintiff might be let in to redeem.

The plantations and estates in question, (which are situated in Jamaica,) were, by indentures of lease, release and settlement, dated the 16th and 19th March, 1768, and made on the occasion of the marriage of Nathaniel Beckford and Elizabeth his wife, (the father and mother of the plaintiff) conveyed to

(d) "Where a particular special promise is charged, to avoid the operation of the statute, the defendant must deny the promise charged, by averment in the plea, as well as by answer, to support the plea." *Mitt.* 219. 3d edit. See *Whitbread v. Brockhurst*, 1 Bro. C. 404. See also *Anon.* 3 Atk. 70.

[1] A plea of the statute of limitations is bad unless accompanied by an answer supporting it, by a particular and precise denial of all the facts and circumstances charged in the bill, and which in equity may avoid the statute. *Goodrich v. Pendleton*, 3 Johns. Ch. Rep. 384. *Bloodgood v. Kane*, 8 Cowen, 350. When a plea of adverse possession must be accompanied by an answer, *Vide Hardman v. Ellames*, 3 Mylne & Keene, 732. As to the necessity of an answer to support a plea, *vide Amer. Ch. Pleading. Plea, IV.* Story's Eq. Plead. 524, 525. *Souser v. De Meyer*, 2 Paige 576. *Orant v. Orant*, 3 Paige 464.

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1822.—Beckford v. Kemble and others.

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trustees, for the term of ninety-nine years, if Nathaniel Beckford and Elizabeth his wife should so long live, upon trust, to secure 300*l.* a year out of the rents and profits, to the separate use of the wife; and to permit and suffer [\*7] \*Nathaniel Beckford and his assigns to receive the residue of the rents and profits for his life:—remainder to the use of Elizabeth Beckford for life:—remainder to the use of trustees to preserve contingent remainders:—remainder to the use of the children of the marriage, in such shares as N. Beckford and Elizabeth his wife, or the survivor of them, should appoint:—remainder (in default of appointment) to the use and behoof of all such children as tenants in common in tail, and if but one child, to such only child in tail:

With divers remainders over.

This deed contained a proviso, by which Mr. and Mrs. Beckford were empowered, during their joint lives, to subject and make liable all the premises therein comprised, to the payment of any sums of money, not exceeding the amount of the principal money due on the incumbrances then charged on and affecting the said plantations and premises, for the purpose of paying off such incumbrances, and also the further sum of 4,000*l.* sterling.

The amount of the incumbrances then affecting the property was not stated in this deed.

Under this power Mr. and Mrs. Beckford, by two indentures, dated the 24th of February 1769 and the 16th of June in the same year, demised these plantations, for two terms of 500 years each, by way of mortgage, for securing the sums of 6,000*l.* and 6,700*l.* sterling, and interest.

In November 1779, they conveyed their life interest in the estates to [\*9] Richard Beckford and Rice James, by \*way of mortgage, for securing the sum of 17,000*l.* currency, and interest.

In the month of July, 1787, the mortgages for 6,000*l.* and 6,700*l.* having become vested in John Beckford, Richard Beckford, and Rice James, these persons filed their bill in the court of chancery in Jamaica, against N. Beckford and Elizabeth his wife, and also against the plaintiff in this cause, (who was then an infant,) praying that an account might be taken of how much was due for principal money and interest in respect of these several mortgages, and that the same might be paid, or in default thereof that the said plantations and estates might be sold.

The court in Jamaica, soon afterwards, on a petition (by the plaintiffs there) appointed N. Beckford to the receiver of rents and profits of the plantations, and directed him, in that capacity, to pay the annuity of 300*l.* out of the rents and profits, to the separate use of his wife Elizabeth, and also a sum of 150*l.* for the maintenance of Susannah Hyde Beckford (the plaintiff in this cause,) then an infant.

John Beckford assigned all his interest in the mortgages to Richard Beckford and Rice James.

Before May 1791, Richard Beckford and Rice James, (who were copart-

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1822.—*Beckford v. Kemble and others.*

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ners in trade) conveyed all their interest in the said several mortgages for 6,000*l.* 6,700*l.* and 17,000*l.* to trustees, for the benefit of their creditors.

On the 9th May, 1791, these trustees filed their supplemental bill in the court of chancery in Jamaica, to \*have the benefit of the proceed- [\*10] ings in the former suit there.

Afterwards, with a view to prevent further litigation in the suit in Jamaica, it was agreed between the several parties to that suit (except the plaintiff in this cause, then an infant,) that an order should be forthwith made, by consent in the cause, to the effect after mentioned: and that upon the passing of such order all further proceedings in the suit should cease, except so far as they related to carrying into execution and giving effect to the said order and agreement, and such further proceedings as might be had in the said cause by the consent of the parties thereto.

Pursuant to this agreement an order was made by the court of chancery in Jamaica, dated 28th January, 1792, whereby it was directed that a new receiver should be appointed, who should pay to Nathaniel Beckford, out of the rents and profits of the plantations and estates yearly, during the joint lives of himself and Elizabeth his wife, the sum of 600*l.* sterling, in lieu of the said annual sums of 300*l.* and 150*l.* theretofore paid to them.

A receiver was appointed under this order, and this annual sum of £600 was paid to Nathaniel Beckford during his life-time.

The partnership between Richard Beckford and Rice James was afterwards dissolved, and on that occasion a provision was made for the debts of the partnership, and the trusts of the conveyance to the trustees for their creditors, ceased.

\*In 1796, Richard Beckford died, and the several mortgages for [\*11] 6,000*l.* 6,700*l.* and 17,000*l.*, became ultimately vested in the defendants, Kemble, Atkins, Mavor, and Samuda, as assignees of bankrupts.

In 1810, Nathaniel Beckford died, and in 1814, Elizabeth Beckford also died, without having executed any appointment under the power reserved in the deed of 19th March, 1768.

The plaintiff, as the only child of the marriage, became thereupon, under the settlement of 19th March, 1768, entitled to the equity of redemption.

Elizabeth Beckford, from the time of the death of her husband, by virtue of an order of the court of chancery in Jamaica, received out of the rents and profits, the yearly sum of 300*l.*; and the plaintiff a yearly sum of 150*l.*

The plantations and estates were now in the possession of Milne and Hamilton, who, as the attorneys of the mortgagees, had, by an order of the court of chancery in Jamaica, dated 29th September, 1813, been appointed receivers.

The mortgage for 17,000*l.* of course ceased on the death of Elizabeth Beckford, and the several subsisting mortgages were vested in the several defendants.

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The plaintiff, by this bill, charged that the mortgages for 6,000*l.*, and 6,700*l.*, (independent of the mortgage for 17,000*l.*), greatly exceeded the amount of the incumbrances subsisting on the plantations and estates [\*12] at the time when the indenture of \*19th March, 1758, was executed, and that the moneys produced by the consignments of the produce of the estates had been misapplied.

The defendants Kemble, Atkins, Mavor and Samuda, by their answer, stated, that in May, 1814, the plaintiff presented a petition to the court of chancery in Jamaica, in the cause there, praying for an adequate annual allowance out of the rents and profits of the estates; and that, by an order of that court, dated 2d June, 1811, it was directed that the annual sum of 350*l.* sterling, in addition to the former allowance of 150*l.* should be made to the plaintiff, out of the rents and profits; but that they (the defendants) had appealed against this order to the king in council.

They also submitted, by their answer, whether the plaintiff was entitled to prosecute this suit, so far as respected the object of the proceedings which had already taken place in Jamaica, or so far as she was entitled to relief in the suit pending in that island.

On the 10th February, 1821, this cause came on to be heard before the vice-chancellor, when his honor made a decree, referring it to the master to inquire and state to the court what was the amount of the principal money due on the incumbrances charged on or affecting the estates in question in this cause at the date of the indenture of settlement dated 19th March, 1768; and whether any, and which, of such incumbrances, or any and what part thereof, had been discharged; and also to inquire and state to the court, what sums of money had been charged on the inheritance of the said estates under the alleged authority of the power contained in the indenture of settlement; [\*13] \*and whether any, and which, of the said sums of money, or any and what part thereof respectively, had been since paid off and discharged, with liberty to the master to state any special circumstances; reserving further directions, and costs.

On the 22d July 1822, the bill of revivor and supplement in this cause was filed, which stated that the defendants, Atkins, Mavor, and Samuda, had, since the decree in this cause, instituted a suit against the plaintiff, in the court of chancery in Jamaica, for foreclosure and sale of the plantations and estates; and that they threatened to proceed as speedily as possible to obtain such foreclosure and sale. The plaintiff therefore prayed an injunction to restrain them from proceeding in the suit in Jamaica.

Mr. *Brill*, and Mr. *Wyatt*, in support of the motion for an injunction:—

The plaintiff having filed her bill in this court for a redemption, and the court having made a decree on that bill, it is an unreasonable vexation in the defendants to proceed in the colonial court, where a different decree may be obtained. If this be permitted, it must interfere with the proceedings of this court. Can this court permit the defendants to proceed under such circumstances,

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and to frustrate, or render nugatory all that has been done here in this cause ? The parties against whom the injunction is sought are all residing within the jurisdiction of this court, and there can be no doubt that there is authority in the court to grant such an injunction. In *Fowler's Exchequer Practice*, (e) it is laid down that the court of exchequer \*can grant an injunction [\*14] to restrain a defendant from proceeding in a suit in the court of chancery, respecting the same matters, after a suit instituted in the exchequer ; and the form of such an injunction is given. This is good law, notwithstanding the case of *Lord Newbury v. Wren*, (f) in which, however, no decree had been made in the suit for redemption.

Mr. Hart, and Mr. Pepys, for the defendants; made the following objections ;

I. There is no rule more invariable than that a mortgagee is entitled to use all his remedies, however multifarious, and however vexatious. He may imprison the mortgagor in an action on the bond ; he may bring an ejectment to recover possession of the estate ; and he may file his bill for a foreclosure of the equity of redemption, all at the same time.

II. Even if it were a rule, that after a decree for redemption, the mortgagee should not be allowed to file a bill for foreclosure, yet that does not apply to the present case. Here there has been no decree for redemption, but only for an account.

III. Suppose it should happen, under this decree, that the master should report a sum to be due to the mortgagees greater than the value of the estate, the plaintiff of course would not then take a decree for redemption, nor proceed farther in this suit ; and \*the defendants could not compel her [\*15] to proceed in it. There would be no alternative but to endeavor to procure this bill to be dismissed. The court would not certainly so far defeat a mortgagee of his just rights.

IV. As to the question of the priority of the suits, that in which the defendants are proceeding in Jamaica has clearly the priority. It was begun in 1787, and has ever since been kept alive ; and the bill on which it is sought now to restrain them from proceeding is a supplemental bill in that cause.

The *Vice-Chancellor* doubted whether he could make the order, without qualification, because it appeared to him that the foreclosure, which would be the result of the suit in this court if the plaintiff did not redeem, would not be so beneficial to the defendants as the decree in their own suit ; for that in their own suit they would be entitled to a decree for the sale of the estate.

Mr. Bell said, there were cases in which this court, noticing the law of Jamaica, had, upon foreclosure, decreed a sale of the estate in the West Indies.

(e) 1 Fowl. Exch. Prac. 270.

(f) 1 Vern. 220. It was held there, by the lord keeper Guilford, that the defendant to a bill for redemption in the exchequer might file a bill to foreclose in chancery ; and that the defendant in the latter suit could not plead the prior suit in the exchequer. In that case no decree had been made in the exchequer, though it appears the defendant there had put in his answer. See *Jay v. Braine*, 1 Eq. Abr. 135.

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The VICE-CHANCELLOR:—All the parties are in England; and it is plain therefore that the accounts can much more conveniently, as well as more satisfactorily, be taken here than in Jamaica. It appears to me that the plaintiff in this court has a clear equity to be protected against a double account of the amount due on the mortgages. I shall therefore make an order to restrain the defendants from proceeding in Jamaica until the further order [\*16] of this court, with liberty to the defendants to make such \*application as they shall be advised, with respect to the Jamaica cause, after the master shall have made his report here; the plaintiff in this cause undertaking to consent to such order or orders in the court in Jamaica as this court shall think reasonable. (g)

The following is the order pronounced:—

“This court doth order that the defendants, John Atkins, John Mavor, and David Samuda, be restrained, by the injunction of this court, from any further proceeding in the supplemental suit in the pleadings mentioned, instituted by the defendants in the court of chancery in the island of Jamaica, until the further order of this court, with liberty for the said defendants to make such application to this court as they shall be advised, with respect to such suit in Jamaica, after the said master shall have made his report in this cause, under the order made in this cause the 10th day of February 1821; the plaintiff, by her counsel, undertaking to consent to any order to be made in the said suit in Jamaica, which this court shall at any time think reasonable.”

Reg. Lib. 1822; B. 2453.

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[\*17] \*RICHARD MARRIOTT, and JULIA ANN MARRIOTT, infants, by W. Pallet, their next friend, plaintiffs; and RICHARD WHITE, R. ANDREWS, and SIR JOHN CHANDOS READ, defendants.

1822, 5th November.—*Practice.*

A person who is not a party to a cause may present a petition in the cause to have deeds belonging to him, which had been brought into the master's office under the usual direction in the decree, delivered out to him.

In 1802, John Pettit sold and conveyed to John Marriott and Richard Marriott, deceased, the manor of Abbot's Hall in the county of Essex, and certain

(g) See *Harrison v. Gurney*, 2 J. & W. 563; *Bushby v. Munday*, 5 Madd. 297; and *Elliott v. Lord Minto*, 6 Madd. 16, as to the principle on which this court acts in cases where proceedings were instituted by the same parties as to the same subject-matter in a foreign court. In the two first cases, this court granted an injunction to restrain the proceedings in the foreign court. [Injunction granted to restrain defendants from suing in Ireland, *Lord Portarlington v. Souby*, 3 Mylne & Keene, 104. See further, *Diggs & Keith v. Wolcott*, 4 Cranch, 179. *Bicknell v. Field*, 8 Paige, 440. *Ward v. Arredondo*, Hopkins, 213. *Watkins v. Holman*, 16 Peters. 57. *Salt v. Donegall*, Lloyd & Gould, 82. Amer. Ch. Dig. Jurisdiction, IV. *Mitchell v. Smith*, 1 Paige, 287. *Brecoort v. M'Jimsey*, 1 Edw. 551. *Wedderburn v. Wedderburn*, 2 Beav. 208.]

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other hereditaments, situate in Stratford in the same county, and received the purchase money. But some doubts existing as to the title to part of the premises, Pettit, by an indenture, dated the 26th March 1802, assigned another estate, situate in Hemstead and Steeple Bumpstead, in the county of Essex, to one Baxter, for the remainder of two terms of years, upon certain trusts, for indemnifying the Marriotts against any claim which might be made to the property sold to them, within twenty years from the date of the indenture; and, at the expiration of that time, upon trust, at Pettit's expense, to re-assign the estate comprised in that indenture, to Pettit, his executors, administrators, and assigns.

Pettit delivered this indenture, and several other deeds and writings relating to the title to the premises in Hemstead and Steeple Bumpstead, to Baxter; and Baxter deposited them with the Marriotts, and afterwards died.

\*John Marriott died in 1818, having devised and bequeathed all his [\*18] real and personal estate to Richard Marriott, upon certain trusts, for the benefit of the plaintiffs, and appointed Richard Marriott his executor.

Richard Marriott died in 1813, having appointed the defendants, White and Andrews, his executors.

By the decree made on the hearing of this cause in June 1818, it was referred to the master to take an account of the personal estates, and of the rents and profits of the real estates of the two Marriotts; and, for the better taking of those accounts, the parties were to produce before the master all deeds, papers, and writings, in their custody or power relating thereto.

In pursuance of this decree, White and Andrews deposited in the master's office all the deeds and writings that had come into their hands, as the personal representatives of the Marriotts; and amongst them, the deeds and writings relating to the title to the premises at Hemstead and Steeple Bumpstead.

Pettit, Rist, and French, presented a petition in this cause, stating that Pettit had sold those premises to Rist and French, and that the period for which the indemnity was to continue had expired; and therefore praying that it might be referred to the master to inquire and state whether the purposes for which the deeds and writings were deposited with the Marriotts had been answered. An order was made according to the prayer of the petition on the 27th June last; and the master, by his report, dated the 31st of July following, certified that the purposes for which the deeds \*and writings were de- [\*19] posited with the Marriotts had been answered.

Pettit, Rist, and French, now presented another petition in the cause; and after stating the facts before mentioned, and that there was nothing in the transaction between Pettit and the Marriotts which gave occasion to the carrying of the deeds of indemnity into the master's office, but that the expediency of so doing, (if any such expediency existed) arose out of considerations affecting those persons alone who were interested in the estates of the Marri-



1822.—Garstone v. Edwards.

otts, and were altogether foreign from the purposes of the indemnity, or the interest of the petitioners, that the costs of getting those deeds out of the master's office ought to be borne by those estates, and that the sum of 498*l.* 17*s.* 3*d.* cash was then standing in the name the accountant-general, to the credit of the cause, on account of the rents and profits of the real estates of Richard Marriott, they prayed that the master's report might be confirmed, and that he might be ordered to deliver to Rist and French the deeds and writings which were deposited with the Marriotts, and also the indenture of the 26th of March, 1802; and that the costs of the petitioners, and all other parties might be taxed, and paid out of the funds arising from the rents and profits of the real estates of the Marriotts.

Mr. *Bell*, and Mr. *Alcock*, for the petitioners.

Mr. *Heald*, and Mr. *Temple*, for the plaintiffs, opposed that part of the prayer of the petition which related to the costs.

[\*20] \*The VICE CHANCELLOR:—As the term of twenty years was not expired when the deeds were brought into the master's office, the testator's estate had an interest in those deeds at that time, and they were therefore property brought into court under the decree.

A stranger may intervene in a cause with respect to a claim of interest in property which the court has taken under its protection; as upon a petition to be examined *pro interesse suo*, or to be at liberty to bring an ejectment where the court had appointed a receiver.[1]

His honor made an order for the delivery of the deeds, according to the prayer of the petition; and directed the costs of all parties, under the former order, as well as under the present petition, to be taxed, and paid out of the sum (498*l.* 17*s.* 3*d.*) in court.

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### GARSTONE v. EDWARDS.

1822, 6th November.

Biddings will not be opened, even in a creditor's suit, upon an advance of 350*l.* upon 5,300*l.*

Mr. *Horne* moved to open biddings upon an advance of 350*l.* upon 5,300*l.* on the ground that this was a creditor's suit, and an insolvent estate; and he

[1] Whether a party is entitled to relief by petition or must apply by bill, depends on circumstances and the sound discretion of the chancellor. Where the petition is upon some collateral matter, which has reference to a suit in court, he may be relieved on petition. *Codwise v. Galston*, 10 Johns. Rep. 508. A bill was dismissed where the proper application was by motion or petition, *Paff v. Paff*, Hopkins, 584. See further, *Matter of Bostwick*, 4 Johns. Ch. Rep. 102. *Cassmajor v. Strode*, post, 381.

1822.—*Cust v. Boode.*

cited *Brooks v. Smith*, (a) in which case the advance was only 500*l.* upon 10,000*l.*; and *White v. Wilson*, (b) where there was the same advance upon the same sum, and the motion was refused solely because the report had been confirmed. In the two cited cases, the advance was only 5*l.* per cent upon the purchase money; here it was 6½*l.* per cent. (c)

\*The *Vice-Chancellor* refused the motion; saying, it is true the [\*21] court does not confine itself to a particular rate per cent, although 10*l.* per cent is a sort of general rule. The cases cited establish, that where an advance so large as 500*l.* is offered, the court will act upon it, though it be less than 10*l.* per cent; but in this case 250*l.* only is offered. [1]

*CUST v. BOODE.*

1822, 6th November.—*Practice.*

An order having been obtained by plaintiff to take a demurrer off the file, it is irregular if the defendant file a plea and answer before the demurrer is actually taken off.

MR. Koe moved that the plea and answer of A. C. Boode, one of the defendants in this cause, filed on the 1st day of November instant, might be taken off the file for irregularity, with costs to be taxed.

On the 8th of October, Boode filed a demurrer to the bill. On the 1st of November, the plaintiff moved to take the demurrer off the file, on the ground that it had been put in after the defendant had obtained orders for time to answer. The motion was granted; and, on the same day, before the demurrer was taken off, or even the order drawn up, the defendant filed a plea and answer. In this stage the present motion was made by the plaintiffs.

Mr. Koe, in support of the motion, insisted that there could not be two defences on the files of the court at the same time; and cited *Curzon v. Lord De la Zouch*, (a)

\*Mr. Hart, contra:—

[\*22]

The moment the order is pronounced the demurrer is off the file; *Lorimer v. Lorimer*, (b) Can the plaintiff complain that the defendant saves him the trouble and expense of serving the order?

(a) 3 Ves. & B., 144. (b) 14 Ves. 151. (c) See also *Ex parte Partington*, 1 Ball & Beatty, 209.

(d) 1 Swanst. 185, note (a). (e) 1 J. & W. 284.

[1] The practice of opening biddings has not been adopted in New-York. *Williamson v. Dale*, 3 Johns. Ch. Rep. 290. See also *Lensing v. McPherson*, 3 Johns. Ch. Rep. 424. *Brookfield v. Bradley*, post, 23. A person present at the sale allowed to open biddings, but a larger advance expected from him. *Tyndale v. Worre*, Jacob, 525. Vide *Biggs v. Rowe*, Sausse & Scully, 152, and notes of the Reporters, where the cases on the subject are collected. An advance on the value of the timber required, in addition to the advances on the price of the land. *Bates v. Bonner*, 6 Sim. 380.

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 1822.—*Brookfield v. Bradley.*


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Mr. *Koz*, in reply :—

This order is never served, but is taken to the clerk in court, and he takes the demurrer off the file.

The *Vice-Chancellor* said that the demurrer was not taken off the file by the mere pronouncing of the order ; but that when the order is drawn up, it is carried to the clerk in court, who withdraws the demurrer, and usually annexes the order to it. .

In order, however, to save unnecessary expense, the *Vice-Chancellor* did not order the plea and answer to be taken off the file, but directed that the defendant should pay the costs of the motion, and that the plea and answer should be taken as if regularly filed.

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[\*23]

\**BROOKFIELD v. BRADLEY.*

1822, 6th November.—*Biddings.*

Two lots ordered to be re-sold in one, where the advance offered on the smaller lot was not sufficient to authorize the opening of the biddings for that lot separately. (a)

Upon a sale before the master, two lots were purchased by A. B. ; one for 65*l.* and the other for 9*l.*

Mr. Garratt moved to open the biddings, offering an advance of 70*l.* for the former lot, and 30*l.* for the latter.

The vice-chancellor refused to make the order for the second lot, the advance being under 40*l.* ; but recommended the party moving to give a new notice of motion, that the biddings for the two lots might be opened, and that a re-sale might take place in one lot, upon an advance of 100*l.* on the two lots. This would remove the difficulty of the small advance upon the second lot.

A new notice of motion was accordingly given, and the order was made for a re-sale in one lot, on an advance of 100*l.*

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[\*24] \**CHRISTOPHER WELLMAN*, plaintiff ; *JOSEPH BOWRING*, *WILLIAM WEAVER*, and *ELIZABETH* his wife, *JOHN AXE*, *MARY GENCE*, and *GEORGE BOWRING*, defendants.

1822, 7th November.—*Construction. Surrender.*

The ultimate limitation on a surrender of copyholds, in default of appointment being to the two first named executors or administrators of the surrenderor, and the custom of the manor not admitting tenants to any larger estate than to two, for their joint lives and the life of the survivor, these executors or administrators are not trustees for the customary heir.

Query, whether the administrators shall hold for their own benefit, or as trustees for the next of kin.

(a) So *Watts v. Martin*, 4 Bro. 113. Vide *Garstone v. Edwards*, ante, 20.

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1822.—Wellman v. Bowring and others.

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The plaintiff claimed to be absolutely entitled in equity to a copyhold estate of the manor of Slape, in the county of Dorset. His bill prayed that Joseph Bowring, on whom the legal estate had descended, might be declared to be a trustee for his benefit, and be decreed to execute such surrender as he should direct.

According to the customs of the manor of Slape, no tenant can be admitted to an express estate of inheritance. The largest estate to which tenants are ever admitted, is to two for their joint lives and the life of the longest liver of them. But any tenant admitted for his life has a power to nominate one or two persons to succeed him, "jointly and successively," as tenant or tenants; and that right of nomination may be exercised either by surrender in open court, or out of court, by writing executed in the presence of two tenants of the manor, who must attest the same; and the form of such surrender or nomination is to the surrenderee or nominee "and his assigns for ever;" or if two, to them "and their assigns for ever." A nomination of this kind need not be presented to the steward of the manor, or at the court, before the nominee applies to be admitted. It was also alleged to be a custom of the manor, that a surrenderee, before he has himself been admitted, may surrender in favor of another person, who is entitled to be admitted although the original surrenderee has never been admitted, \*provided he pays the double fine. [\*25] Where there has been no surrender or nomination, the heir at law of the last tenant is entitled to be admitted, subject, however, to the right of the widow to the estate during her widowhood. The fine payable by a widow on admittance, is one penny; that payable by the heir at law or nominee in respect of the estate in question, 10*l*.

In 1764, Joseph Bryant was entitled to the estate now claimed by the plaintiff. On the 13th July 1764, in consideration of his intended marriage with Elizabeth Wellman, he surrendered this estate into the hands of two of the customary tenants of the manor, according to the custom thereof, to the use of Benjamin Wellman and John Bowring, for their lives, and the life of the survivor of them, and of their assigns for ever, according to the custom of the manor, upon trust, to stand possessed thereof in trust, after the marriage, to permit Bryant to receive the rents and profits to his own use, during his life; and after his decease, in trust to permit E. Wellman to receive the rents and profits during her life; and, after their decease, upon trust, to surrender the same to the use of such one or two children of the said marriage as Bryant and his wife, or the survivor, should appoint; and, in default of appointment, upon trust, for such one or two children absolutely; and, in case there should be no such issue, then upon trust, within two calendar months next after the decease of the survivor of Bryant and his wife, to surrender the estate to the use of such person and persons, for the term of his, her, or their life or lives, and of his, her, or their assigns, for ever, as Bryant should, by any writing, or by his last will and testament, executed and \*attested respectively as [\*26] therein mentioned, nominate or appoint; and, for want of such nomination

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 1822.—*Wellman v. Bowring and others.*


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or appointment, upon trust, to surrender to the use of the executors or administrators of Bryant, if not exceeding two, for the term of their lives, and of their assigns, for ever; but if he should leave more than two executors, or administration to him should be granted to more than two, then to the use of the two that should be first named in his will as his executors, or, in the administration, as his administrators, for the term of their lives, and of the life of the longest liver of them, and of his or her assigns, for ever. The deed by which these uses were declared, contained a power for the husband and wife, at any time during their joint lives, with the consent of the trustees, or of the survivor of them, or of the executors or administrators of such survivor, to revoke the surrender, and to dispose of the premises, as they should, with the like consent, think fit. This surrender was duly executed, but the trustees were not regularly admitted to the estate.

The marriage between the parties was shortly afterwards solemnized.—There never was any issue of this marriage. In the year 1779, Bryant died intestate, and without having made any appointment or nomination in pursuance of the power reserved to him, and without having in any manner revoked the uses of the settlement, leaving Elizabeth Bryant, his widow, and John Bowring, since deceased, son of John Bowring, the trustee of the settlement, his nephew and heir at law, and heir according to the custom of the manor, him surviving. Soon after Bryant's death, his widow obtained letters of administration of his personal estate, and she called upon the trustees to surrender the estate to her, according to the provisions of that settlement; and [\*27] they, although they had not themselves been regularly \*admitted, yet it being supposed that they were regular in so doing, at a court holden for the manor on the 20th of June 1782, absolutely surrendered the estate to her and her assigns for ever, according to the custom of the manor.

Mrs. Bryant was thereupon, at the same court, admitted to hold the estate for the term of her life, according to the custom of the manor. Her admission was in the following form; "To this court came Elizabeth Bryant, widow and administratrix of all and singular the goods and chattels of J. Bryant, her late husband, deceased, and took of the lord, by the delivery of the steward, all, &c. by virtue of a certain surrender to her thereof made by B. Wellman and John Bowring, bearing even date herewith; to hold the said premises unto the said E. Bryant for the term of her life, according to the custom of the said manor, under the rent, duties and services accustomed for the same; and for such estate so to be had in the premises, the said Elizabeth Bryant gave to the lord, for a fine, 10*l.* and was admitted tenant, but her fealty was dispensed with."

According to the form of this admission, Mrs. Bryant was entitled to the absolute property in the premises, and had full power to dispose thereof, the form of her admission being that used by the custom of the manor to give the longest and most absolute property in lands held of that manor. After her admittance, she nominated Benjamin Wellman, and Benjamin Wellman the younger,

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his son, to be admitted to the estate upon her decease. She herself continued in possession of the estate until the time of her death. In 1803 she died; having paid all her husband's debts; so that since her death no one had administered to his estate.

\*Benjamin Wellman the elder having died in Mrs. Bryant's lifetime, [\*28] B. Wellman the younger, upon her death, became entitled absolutely to the estate under her nomination. Accordingly, on the 8th of August 1803, he was admitted tenant of the estate for his life, according to the custom of the manor, and paid to the lord the customary fine of 10*l*. He continued in possession of the estate until his death. In 1806 he died, having duly nominated, according to the custom of the manor, his son, Hugh Wellman, to be admitted tenant upon his death; but after his death, his widow was admitted for her widow's estate. Hugh Wellman died in her lifetime, leaving the plaintiff, his brother and heir at law, and heir according to the custom of the manor. The plaintiff was also the eldest son and heir at law, and heir according to the custom of the manor, of B. Wellman the younger. In 1813, the widow of B. Wellman the younger died, and the plaintiff thereupon was, at a court baron held for the manor on the 9th of June 1813, duly admitted to the estate for his life, according to the custom of the manor, as eldest son and heir at law, or customary heir of Benjamin Wellman the younger, and as eldest brother and heir of Hugh Wellman. This admission was in the following form: "To this court cometh Christopher Wellman, of Bristol, in the county of Somerset, eldest son and heir at law or customary heir of Benjamin Wellman, deceased, and also eldest brother and heir of Hugh Wellman, deceased, who was heir and nominee of the said Benjamin Wellman, and who died an infant, and claimeth to hold, for the term of his life, all, &c. by virtue of being the eldest son and customary heir of the said B. Wellman, deceased, and of being the eldest son and customary heir of the said Hugh Wellman, also deceased, the nominee of the said B. Wellman, \*and who died an infant, unadmitted and inca- [\*29] pable of making any act to dispose thereof according to the said manor; and the said Christopher Wellman prayeth to be admitted as tenant thereto; to whom the lord of the manor doth here, in full court, grant seisin thereof by the rod; to hold the said premises unto the said Christopher Wellman for his life, according to the custom of the said manor, under the yearly rent of 4*s*. 4*d*. and all heriots, dues, duties and services of right due and accustomed to the lord of the said manor for the same; and the said Christopher Wellman, for such his estate in the said premises, gave to the lord of the said manor, for a fine, the sum of 10*l*. but his fealty is respited."

It was not discovered, until a short time before this bill was filed, that Benjamin Wellman and J. Bowring had not been regularly admitted before the surrender to Mrs. Bryant in the year 1782, and that the surrender then made was inoperative as to the legal estate, which had remained in J. Bryant until his death, and upon his death descended to John Bowring, as his nephew

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and heir at law and customary heir. Joseph Bowring, the defendant, was the heir at law, and heir according to the custom of the manor, not only of John Bowring the trustee named in the settlement, but also of Joseph Bryant the settlor.

Joseph Bowring, and the other defendants, were the next of kin of Joseph Bryant.

Some time before the bill was filed, Joseph Bowring brought an action of ejectment against the tenant in possession of the estate under the plaintiff; \*and the judge who tried the action being of opinion that the legal estate was vested in Joseph Bowring, the jury found a verdict in his favor.

The plaintiff insisted by his bill, that it was intended by Bryant and all the parties to the settlement, that the whole interest in the premises, subject to the life estate thereby created, and in the event of there being no children of the marriage or other appointment by Bryant, should be enjoyed by his administrators or executors for their own use and benefit; and that it was in consequence of this intention that Bryant abstained from making any other disposition of the ultimate interest in his estate, though he was entitled to do so by the settlement: He also insisted on various acts by which the defendant Joseph Bowring, as well as John Bowring the younger, through whom he claimed, and all the other defendants, had repeatedly admitted, that they had no claim to, or beneficial interest in, the premises; and on the fact, that John Bowring and the defendants, though they well knew, long before the year 1808, that Mrs. Bryant was not admitted to the premises for her widow's estate, yet never attempted to have it secured for their benefit, or made any claim thereto until after Mrs. Bryant's death; when Joseph Bowring, in Hilary term 1808 (supposing that the legal estate was vested in the persons claiming under Mrs. Bryant) filed his bill in this court, praying, that the premises might be surrendered to him, and that, if the court should be of opinion that Bryant's next of kin were entitled upon his decease to the premises, then a surrender might be executed to such next of kin; but that, having lately discovered the defect in the supposed want of the admission of B. Wellman and John

Bowring, he had abandoned that suit, and proceeded in the ejectment.

[\*31] \*The plaintiff also insisted, that if the next of kin of Joseph Bryant, had any interest in the premises, he, in right of Mrs. Bryant, the widow of J. Bryant, was entitled to one moiety thereof.

The bill therefore prayed, that Joseph Bowring might be declared a trustee of the premises for the plaintiff, and might be decreed to execute a proper surrender thereof to him; or, if the court should be of opinion that Bryant's next of kin had any interest in the premises, then that the plaintiff might be declared entitled to all such interest as Mrs. Bryant had therein, and that Joseph Bowring might be restrained from proceeding in the action of ejectment.

The defendant Joseph Bowring, by his answer, insisted, that Mrs. Bryant

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acquired, by her admission, an estate for her life only, as the widow of her late husband, and not the absolute property in the premises, although the form of her admission was the form used by the custom of the manor to confer the largest and most absolute property in the premises: and that, upon the death of John Bowring, who was the customary heir of Joseph Bryant, as well the equitable, as the legal estate in the premises, became, and still was, vested in him (Joseph Bowring) absolutely, and not subject to the trusts in the bill mentioned, or to any other trust; and that neither the beneficial nor legal interest which Bryant had in the premises, was effectually bound or disposed of by the settlement of July 1764; and that Bryant did not, by such settlement, or by any other means, effectually nominate or designate the persons who were to have the benefit of, or to be admitted to the premises after his death; and he submitted that, if the settlement was effectual to vest in the \*trustees any equitable or beneficial interest in the premises, he as heir at law of Bryant, was, under that settlement, entitled to the entirety of the premises; or that, as one of Bryant's next of kin, he was entitled to a share thereof jointly with the other defendants. [\*32]

The other defendants, by their answer, submitted that, upon Bryant's death, the property (subject to the estate limited by the settlement to Mrs. Bryant for her life) descended, according to the custom of the manor, to them and the rest of Bryant's next of kin, or became vested, under the settlement, in the administratrix, for their benefit; and that Mrs. Bryant had no right to make any nomination and appointment of the estate; and that the plaintiff did not by the several surrenders and admissions in the bill mentioned, or by any other means, become entitled to any legal interest in the premises, or if he did, that he was a trustee thereof for the next of kin. And they also submitted, that, according to the true intent and meaning of the settlement and the custom of the manor, the limitation contained in the settlement, was intended to be a limitation for the execution of the trusts of Bryant's will, if he should make any, and, if not, for the benefit of his children, or other next of kin, who, according to the custom of the manor, would otherwise have been entitled to the premises. And the defendants, George Bowring, William Weaver, and Elizabeth his wife, in her right, and Mary Genge, as three of the next of kin of Bryant, and the defendant, John Axe, as the representative of Jane his late wife, another of such next of kin, claimed four fifth parts of the premises, and of the rents and profits thereof, since Mrs. Bryant's death.

\*It was proved by evidence on behalf of the plaintiff, that Mrs. Bryant, upon the premises being surrendered to her by the trustees, did in fact pay the fine due upon their admission, as well as upon her own. [\*33]

The ejectment mentioned in the pleadings was first tried at the summer assizes for the county of Dorset, in the year 1816, when the plaintiff was nonsuited; but the learned judge who tried the action gave the lessor of the plaintiff leave to move to set the nonsuit aside; and a rule nisi having been obtained for that purpose, it was made absolute in Hilary term 1817. The ac-



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tion having again come on the trial, at the following spring assizes for the county of Dorset, a verdict was found for the lessor of the plaintiff.

The cause now came on to be heard.

Mr. Wingfield, and Mr. Preston, for the plaintiff:—

This estate is a fee simple, by way of perpetual renewal, and the legal estate in this copyhold is, according to the last decision at law, in the defendant Joseph Bowring. By the custom of the manor, the parties who make the surrender are to designate the person who is to take. Why is it not a good designation to say, "I leave the estate to the person who is my personal representative?" It may be said that this is a conversion into personal estate. But that argument cannot be raised, because these are words of description and not of limitation; and therefore the person who fills the description is to take the estate beneficially, and independent of any trust. There is no intention that the persons here described were to take the estate in the character of executors or administrators, for the words are not to "the executors [\*34] \*and administrators," but "to the two that should be first named;" therefore, it is quite obvious that the party here designated as executor was not meant to take as such, so as to make the estate part of the settlor's assets. *Crammer's case*; (a) *Spark v. Spark*; (b) *Evans v. Charles*; (c) *Sanders v. Franks*. (d) In the last case, the gift was "to the executors and administrators, to and for his, her, or their own use and benefit;" and the words "to and for his, her, or their own use and benefit," formed the ground of the decision. Here too the settlor does not stop at the words "executors or administrators," but adds, "and their assigns for ever," which are equivalent to the words which formed the ground of decision in the former case, and show that the executors and administrators were to have a power of alienation. It is quite clear, therefore, from the context of this settlement, that Bryant did not intend to select executors, as executors; but that they should take the estate for their own benefit.

Mr. Sugden, and Mr. James Stephens, for the defendant Joseph Bowring:—

It is admitted that this estate is *quasi* an estate of inheritance; and that, if not otherwise disposed of, we are entitled. Indeed, it is quite settled that this mode of limitation does create an estate of inheritance. The tenant may cut timber, and has all the privileges of a tenant in fee. The courts incline to hold, upon the slightest expression, that the heir is entitled to the exclusion of all other persons; therefore, if there had been no specialty against our title, we should have taken as heir at law. The parties might have limited the [\*35] estate to themselves, without limiting it to two \*trustees; but their intention was to place the estate throughout in trustees: the intention of the parties was, in order that they might have trustees on whom they could rely until some person became absolutely entitled, that their own executors should be trustees. The question is, who is entitled to the equitable interest; not whether

(a) *Dyer*, 309, a.

(b) *Cro. Eliz.* 666 and 840.

(c) 1 *Anstr.* 128.

(d) 2 *Madd.* 147.

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the executors take as *persona designata*, but whether they take for their own benefit or not. It is quite clear, that where property is given to the personal representatives of any person, that they do not take for their own benefit, but as trustees.<sup>(e)</sup> The case of *Ripley v. Waterworth* <sup>(f)</sup> decided that it was impossible that executors should take any interest in the character of executors which is not liable to debts and distribution; and there the will was not executed so as to pass the estate itself. There was a case mentioned there, as to the difficulty which arose upon a disposition of stock by an unattested will. Though all the acts require that a will disposing of stock should be attested by two witnesses, yet it was held, that, if the will was not so attested, the executors must hold it for the persons for whom the testator intended it.

The case of executors taking as special occupants, and yet holding the land as assets, before the statute of 2 Geo. II., still further supports this position. The authorities for this are *Westfaling v. Westfaling*, <sup>(g)</sup> *Duke of Devon v. Kinton*, <sup>(h)</sup> *Williams v. Jekyll*. <sup>(i)</sup>

*Evans v. Charles*, which has been cited for the plaintiff, has been doubted repeatedly, and has been denied \*by the Lord Chancellor; be- [\*36] sides, the funds in that case belonged to third persons. In *Sanders v. Franks*, the judgment turned upon the words "to and for him, her, and their own use and benefit," which are not found in this case.

It was admitted for the plaintiff, that the reason why the two first executors were to take, was, not because the settlor had any affection for those who might be first named, but because the custom did not enable him to give it to more than two. It cannot be supposed that the settlor intended a provision for persons over the appointment of whom he had no control. The administrator is the nominee of the ordinary, not of the intestate. The settlor could not control the way in which the ecclesiastical court might choose to state these persons as administrators. If administration had been granted to creditors, then the two first named would have taken as purchasers, for their own benefit, and to the exclusion of the other creditors. Suppose that Bryant had made a will, appointing four executors, and that the two first named died in his lifetime, there would have been a forfeiture to the lord for want of a tenant; a risk to which it cannot be supposed that he meant to expose his estate.

It has been suggested, that the intention to give beneficially arose from the anticipation, that, in the event of intestacy, the husband and wife would be entitled to represent each other; and that, therefore, this was but a mode of indirectly giving the estate to them in that event. That this could not be the intention is evident from the frame of the settlement; for the surrender to the executors or administrators is not directed to be made until two months after

(e) Leon. 239. *Bridge v. Abbott*, 3 Bro. 224.

(g) 3 Atk. 466.

(h) 2 Vern. 719; 2 P. W. 381. This case is reported by P. W. under the name of *Duke of Devon v. Atkins*.

(i) 2 Ves. 681.

(f) 7 Ves. 425.

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[\*37] the decease of the \*survivor of the husband and wife; and besides, an estate for life is given to the wife if she survives, which implies that nothing further is intended for her.

It appears that the framers of the settlement supposed, that, upon the death of the survivor of the trustees, his executors would be entitled, by the custom of the manor, to have their names on the rolls; for it is the consent of the executors, not of the heir of the surviving trustee, that is required to enable Bryant and his wife to revoke the uses of the settlement, and to make a new disposition of the estate. And if they supposed that the executors of the surviving trustee would by the custom be entitled to have their names on the rolls, it may be fairly inferred that they intended the estate to revert to its ancient line of descent. Now the plaintiff's claim rests on the supposed intention of the settlor to divert this property from the regular course of descent. But what motive could there be to alter the descendible quality of this estate?

There is another ground that may be taken; that this limitation operates only in equity, and gives the other party no equity whatever to come against the party who has the legal estate; for the limitation is merely voluntary. *Sutton v. Chetwynd*. (k) A limitation to executors and administrators must include strangers to the consideration of the settlement. And if a stranger come for the execution of a covenant, the answer is, that being a stranger to the consideration, he cannot call upon the court for the legal estate.

THE VICE-CHANCELLOR:—This is a mere case of intention upon the construction of the settlement. There is here no question that the \*administratrix was a *persona designata*, with apt words of limitation, according to the nature of the property, and was entitled to take the copyhold as a purchaser.

The real question in the cause is, whether the husband intended that the administratrix should take the copyhold beneficially or as a trustee. A trust may be either expressed or implied. There is clearly here no trust expressed. [1] Nor is there any thing in this settlement from which a trust can be implied, unless it can be maintained that the copyhold is given, not to the persons of the executors or administrators, but to their office. But if this could be maintained it would not benefit the defendant in his character of copyhold heir. It might benefit him in his character of one of the testator's next of kin. But before I can consider the claim of the next of kin, I must know that I have before me all the persons, who, being next of kin, are entitled to be heard upon this question. [2]

All therefore I can do at present is, to declare that the defendant Joseph

(k) 3 Mer. 249.

[1] No particular form of words is necessary to create a trust, the intent only being regarded by courts of equity. *Fisher v. Fields*, 10 Johns. Rep. 494. *Chamberlain v. Thompson*, 10 Conn. Rep. 243, Amer. Ch. Digest, Trust, 1.

[2] As to necessary parties, vide Amer. Ch. Digest, Pleading,—Bill, XVII.

1822.—*Roberts v. Roberts.*

Bowring, as the copyhold heir of Joseph Bryant the husband, was a trustee of the legal estate for the widow as administratrix of her husband; and to refer it to the master to inquire who are the next of kin; and to reserve the consideration of all further directions until after the master shall have made his report. [1]

## \*ROBERTS v. ROBERTS.

[\*39]

1822, 7th November.

Where the subject of a suit has been disposed of out of court, the court will not hear the cause merely for the purpose of disposing of the costs.

THE plaintiff filed his bill against the defendant, his brother, praying that a deed, to which he claimed to be entitled, might be delivered up to him.

After the suit was ripe for hearing, the defendant purchased of the plaintiff that title under which he claimed the deed.

The cause was now called on to be heard.

Mr. Sugden, for the defendant, stated these facts to the court, and wished the cause now to be heard, for the purpose of determining the question of costs of the suit.

The counsel on the other side admitted the facts, and were also desirous that the cause should be heard for that purpose.

THE VICE-CHANCELLOR:—The court entertains the subject of costs only as incidental to the subject of the suit. When, out of court, the parties dispose of the subject of the suit, they must dispose of the costs also. The court will not hear the cause for that purpose. [2]

[1] This case appears to have been litigated with great zeal. In 2 Russell, 374, the decree of the vice chancellor was affirmed by the lord chancellor. But the question whether the wife took a beneficial interest was still left open. The case having then come back to the successor of the former vice-chancellor; (Sir John Leach); the then vice-chancellor, (Sir Launcelot Shadwell,) decided that he was bound to declare that Elizabeth Bryant did take the equitable fee in this copyhold estate, as the administratrix of her husband, and as part of his personal estate, and it was accordingly declared that Elizabeth Bryant as administratrix, &c. was entitled to the equitable fee of the copyhold, &c. for the benefit of herself, and the next of kin, of the said Joseph Bryant, according to the statute for the distribution of intestates' estates. 3 Sim. 328. I have not met with any further trace of this case. The cases—as to who shall take a beneficial interest, under circumstances like those of the case in the text—whether the executor or administrator;—or the heir at law; are too numerous to be introduced in this place. I merely refer to a few decisions, in which the above was relied upon as an authority. *Barns v. Otty*, 1 Mylne & Keene, 465. *Palin v. Hills*, id. 470.

[2] The same point was decided in the same way, five or six years before the decision of Sir John Leach, by Chancellor Kent, in *Eastburn & Downes v. Kirke*, 2 Johns. Ch. Rep. 317. "One can never come into chancery to pray a decree for costs only. Costs in chancery do not depend upon any statute, nor do they absolutely depend upon the event of a cause. They rest in sound discretion, to be exercised under a consideration of all the circumstances. A party cannot have a re-hearing for costs only, except in special cases, and it is understood that an appeal will not lie merely for costs." Ch. Kent, *ibid.* Vide *Attorney General v. Butcher*, 4 Russell, 180. In *Burkett*

1822.—Wellbeloved v. Jones.

[\*40]

## \*WELLBELOVED v. JONES.

1822, 8th November.—*Charities.*

The attorney general is a necessary party to all suits for charitable funds, except where a legacy is given to the officer of an established institution, as part of its general funds.

Where a legacy is given for permanent charitable purposes, to persons having no corporate character, the court will not, without a reference to the master, allow the fund to be paid over to those persons, even where they are intrusted by the testator with the management of the fund.

THIS was a bill filed by certain persons, who described themselves as trustees or officers of a dissenting academical institution, against the executors of Samuel Jones, for payment to them of a legacy of 5,000*l.* bequeathed to that institution.

Samuel Jones, by his will, dated 19th December 1818, (after giving several annuities and legacies) gave and bequeathed the sum of 5,000*l.* unto his brother William Jones, his nephew, Samuel Jones Lloyd, and James Darbyshire the younger (the defendants in this cause) their executors, administrators, and assigns, upon trust, to transfer and assign the same sum and the stocks, funds and securities wherein the same should be invested, unto the following officers for the time being of an academical institution established at York chiefly for the instruction of dissenting ministers, and commonly called the Manchester New College removed to York, viz. the theological tutor, the visitor, the president, the treasurer, and the vice-president, resident in Manchester; which said several officers, together with such other persons as they should think proper to choose (in case they should think an additional number of trustees necessary) should stand possessed of the said sum of 5,000*l.* and the stocks, &c. in trust, to pay and apply the dividends and interest thereof in augmentation of the salaries of such conscientious dissenting ministers as should stand

[\*41] most in need of such assistance, and as the said trustees should \*approve; a preference being given to those who should have been students in the York institution. And in case such institution should cease, or be given up, then in trust, that the persons in whose names the said trust moneys should be then invested, should transfer the said principal sum to the principal officers for the time being of such other institution as should succeed the same, or be established on similar principles, that is to say, for the instruction of young men in the genuine doctrines of christianity, as revealed in the scriptures, without regard to sect or party; and if there should ever come a time when no institution should exist for that purpose, then the said principal sum of 5,000*l.* to be paid and transferred to the persons calling themselves the trustees of Lady

*v. Spray*, 1 Russell & Myles, 113, it was said by Lord Lyndhurst, Ch. that an appeal would lie in respect of costs, if any principle were involved, and they were not given merely as consequential on the decree. See further, *Winslow v. Collins*, 3 Paige, 68. *Johnson v. Thomas*, 2 Paige, 377. *Green v. Crockett*, 2 Devereux & Battle, (N. Car.) 394. When the defendant moved to dismiss a bill for want of prosecution with costs, the court will not allow the plaintiff to go into the merits of the case to show that it should be dismissed without costs: he should proceed to a hearing. *Carroll v. Donoghue*, 1 Flanagan & Kelly, 98.

1822.—*Wellbeloved v. Jones.*

Hewley's Funds, to be by them applied to the same charitable purposes as that fund then was usually applied to. And the testator thereby empowered and requested the officers of the institution, in whom the sum of 5,000*l.* should first become vested, at any time within the space of twelve calendar months next after the trust moneys should come their hands, to make such further rules and regulations for the distribution of the interest and dividends of that sum, and for preventing any loss of the principal, and for otherwise securing and perpetuating the trusts intended by his will as they should judge necessary or convenient.

At the time of the testator's death, the plaintiffs held, and still hold, the offices of theological tutor, visitor, president, treasurer, and vice-president, of the institution at York. They therefore prayed that the legacy of 5,000*l.* might be transferred to them by the defendants, according to the trusts of the will.

\*The defendants, by their answer, admitted assets, but submitted to [\*42] the judgment of the court, whether the bequest was not a charity bequest, and whether the plaintiffs had any right to institute this or any suit touching the matters alleged in the bill; and whether the attorney general ought not to be a party.

The cause now came on to be heard.

Mr. *Heald* and Mr. *Roupell*, for the defendants insisted on the objection that the attorney-general ought to have been made a party, and said that this was a bequest for a perpetual charity, and that it must be sent to the master to approve of a scheme for the management of the fund.

Mr. *Agar*, and Mr. *S. Smith*, for the plaintiffs:—

Where the testator intrusts the trustees with the administration of a charity as in this case, and reposes a confidence in them, the attorney-general is not a necessary party; though it may otherwise where the management is not so intrusted. In *Waldo v. Caley*,<sup>(a)</sup> where there was a bequest for a charitable purpose, the distribution and application of the fund being left by the testator to the discretion of his wife, she was intrusted with the fund. Here the trustees were most respectable persons, and the management of the 5,000*l.* was, by the words of the will, intrusted to them; they were, therefore, entitled to have it paid over into their hands.

The VICE-CHANCELLOR:—The attorney-general must be made a party. He is \*to be a party, not for the reason stated at the bar, [\*43] but because the king, as *parens patriæ*, superintends the administration of all charities, and acts by the attorney-general, who is his proper officer in this respect.

It has been held not to be necessary that the attorney-general should be a party where a legacy is given to the treasurer, or other officer of some established charitable institution, to become a part of the general funds of that

(a) 16 Ves. 206. In that case there was no bequest for permanent charitable purposes.

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 1822.—*Landon v. Ready.*


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institution ; and this exception is reasonable ; for the attorney-general can have no interference with the distribution of their general funds.

The court will never permit this legacy to come into the hands of the plaintiffs, who now happen to fill the particular offices in this society ; but will take care to secure the objects of this testator, by the creation of a proper and permanent trust ; and, upon the hearing of this cause, will send it to the master for that purpose ; and it will be one of the duties of the attorney-general to attend the master upon that subject.

The cause was ordered to stand over, with leave to amend, by making the attorney-general a party.[1]

[\*44]

\*LANDON v. READY.

1822, 11th November.—*Decree.*

Where a decree is made upon a bill taken *pro confesso*, the court, whether the defendant has or has not appeared, pronounces an absolute decree in the first instance, and does not give the defendant a day to show cause.

In this case the defendant had answered the original bill. An amended bill was afterwards filed, to which he had appeared, but not answered, and had stood out all process of contempt. The cause was therefore now set down for the purpose of having the bill taken *pro confesso* against him.(a)

Mr. *Roupell*, for the plaintiff, having stated the above facts, said, that where a bill was taken *pro confesso* before the defendant had appeared, the court makes the decree, but that, after appearance, the plaintiff was entitled to take such decree as he could abide by.

The VICE-CHANCELLOR :—It appears to me that there is no difference whether the bill is to be taken *pro confesso* before or after appearance. The effect of taking a bill *pro confesso* is, that all the facts stated in the bill are taken to be true, as against the defendant ; but the plaintiff can only have such a decree as the facts of the case entitle him to in the judgment of the court. If a party being served with a subpoena to hear judgment, does not appear, then the plaintiff takes such decree as he can abide by, and a day is given for the defendant to show case against the decree. But where a bill is taken *pro confesso*, no day is given to the defendants to show cause, and an absolute decree is made in the first instance.(b)

(a) That an answer to the original bill cannot be read, and therefore will not prevent the amended bill from being taken *pro confesso*, see *Jopling v. Stuart*, 4 Ves. jun. 619, and *Bacen v. Griffith*, stated in the note to that case.

(b) *Geary v. Sheridan*, 8 Ves. 192 ; and see 13 Ves. 565. [Vide *Baker v. Keane*, 4 Sim. 498. *Wooliams v. Baker*, 6 Sim. 316.]

[1] Vide Story's Eq. Plead. 194.

1822.—Langley v. Sneyd and others.

\*LANGLEY v. SNEYD and others.

[\*45]

1822, 12th November.—*Infant. Descent.*

Where an infant died seized of an equitable estate, descended *ex parte materna*, his incapacity to call for a conveyance of the legal estate (by which the course of the descent might have been broken,) is not a sufficient reason to induce the court to consider the case as if such a conveyance had actually been made; it not being, according to the terms of the trust, any part of the express duty of the trustees to execute such a conveyance.

THE bill prayed that it might be declared that the plaintiff, as heir *ex parte paterna* of Thomas Langley, the son, who died an infant, was entitled to the equitable interest in certain estates devised and appointed to the said Thomas Langley, the son, by the will of his mother, Margaret Langley. One of the defendants claimed these estates as heir *ex parte materna* of Thomas Langley the son. The legal estate was vested in a trustee.

By an indenture, dated 14th October 1786, made between Edward Walburn Okeover, and Margaret his wife, of the one part and John Sneyd, of the other part; after reciting, that, by certain indentures of lease and release, dated the 12th and 13th February 1777, in consideration of the marriage then about to take place between the said E. W. Okeover and Margaret his wife (then Margaret Bowyer, spinster) part of the estates in question in this cause, of which William Bowyer, the father of the said Margaret Bowyer, was then *seised* in fee, were conveyed to Thomas Ley and John Goodwin, their heirs and assigns, to the use of the said William Bowyer for life; remainder to the use of trustees to preserve contingent remainders; remainder to the use of the said E. W. Okeover for life; remainder to the use of trustees, to preserve contingent remainders; remainder to the use of the said Margaret Okeover, for life; remainder to the use of trustees to preserve contingent remainders; remainder to other trustees, for a term of five hundred years, on trust, to raise portions for the younger children of the marriage; remainder to the use of the first and other \* sons of the marriage, in tail; remainder to [\*46] the use of the daughters of the marriage, as tenants in common in tail; with reversion to the use of the right heirs of William Bowyer for ever:—And also reciting, that the said William Bowyer had died on the 3d October 1780, having made his will, whereby he devised (subject to certain charges) all his estates and hereditaments (not settled by the said indentures of the 12th and 13th February 1777) to trustees and their heirs, to the use of his wife, Christiana Bowyer, for her life, in lieu of dower, remainder to E. W. Okeover, for life; remainder to trustees to preserve contingent remainders; remainder to Margaret Okeover, for life; remainder to trustees to preserve contingent remainders; remainder (subject to a charge for daughters and younger children) to the first and other sons of E. W. Okeover and Margaret his wife, in tail; remainder to the daughters of the said E. W. Okeover and Margaret his wife, as tenants in common in tail; with remainder to Margaret Okeover, her heirs and assigns for ever:—And also reciting, that the marriage between E. W. Oke-



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 1822.—Langley v. Sneyd and others.
 

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over and Margaret his wife had been duly solemnized ; and that Christiana Bowyer was then living, and that there was no issue of the marriage ; and that it had been agreed that the reversion and remainder in free simple in all the estates expectant on the determination of the estates for life of Christiana Bowyer, and E. W. Okeover and Margaret his wife, and in default of issue of their bodies should be settled in the manner therein mentioned—It was witnessed, that E. W. Okeover, for himself and his wife, their executors, &c. did covenant with John Sneyd, his heirs and assigns, that they would, as of Michaelmas term 1786, acknowledge and levy unto John Sneyd and his [\*47] heirs a fine *sur cognizance de droit tantum* ; and that the conusee of such fine should stand seised of the said estates, in the first place, to confirm the several uses and estates limited by the recited indentures and will, and, subject thereto, to the use of John Sneyd, his heirs and assigns for ever, upon trust, to convey and assure the estates to the use of such person, and persons, for such estate and estates and in such parts, shares and proportions, &c. as Margaret Okeover, by her last will and testament in writing, or any writing purporting to be such will, to be signed and attested in manner therein mentioned, should appoint ; and for default thereof, in trust for Margaret Okeover, her heirs and assigns for ever.

A fine was duly levied in Michaelmas term 1786, according to the covenant in this deed.

E. W. Okeover died many years ago, without leaving any issue by Margaret his wife. Christiana Bowyer also died many years ago. In 1797, Margaret Okeover intermarried with the Rev. Thomas Langley, who died in 1808, leaving Margaret Langley his widow, and Thomas Langley his only son, and Margaret Langley his only daughter, by the said Margaret Langley his wife, him surviving.

Margaret Langley, the daughter, died an infant, and unmarried, in the lifetime of her mother.

Margaret Langley, the mother, executed a testamentary appointment dated 25th August 1819, according to the forms required by the power, and thereby appointed and gave all the estates to her son, Thomas Langley, his heirs and assigns for ever, subject to certain legacies and other charges ; provided [\*48] ed that if her son should die in her lifetime without issue, \*all her estates should go to her sister, Sarah Welch, for her sole and separate use, and to her heirs, for ever.

On the 22d February 1821, Margaret Langley, the mother, died, without having altered or revoked this appointment. Her son, Thomas Langley, survived her, but died on the 27th March 1821, an infant, unmarried and intestate, leaving the plaintiff, the only brother of Thomas Langley the father, his heir at law.

John Sneyd, the trustee under the indenture of the 14th October 1786, and conusee of the fine, died many years ago, and the legal fee in the estates was now vested in William Sneyd, one of the defendants.

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The other defendants, John Harrison and Elizabeth his wife, and Sarah Ellen Evans, claimed these estates by descent *ex parte materna*; Elizabeth Harrison and Sarah Ellen Evans being co-heiresses at law, *ex parte materna*, of Thomas Langley the son. They therefore, with William Sneyd the trustee, had brought an action of ejectment against the plaintiff, to recover possession of the estates. The bill prayed an injunction to stay this action.

The plaintiff obtained an injunction to stay the proceedings at law: and a motion having been made to dissolve this injunction, the *Vice-Chancellor*, on that occasion, directed a case to be stated for the opinion of the court of common pleas, as to the effect of the will or appointment of Mr. Langley (stating the case as if it operated on the legal estate) and whether Thomas Langley, the son, took by descent or by purchase under the appointment. The case was argued before \*the court of common pleas in Easter term [\*49] 1822, and is reported 3 Brod. & Bing. 243. The certificate of the judges of the court of common pleas was in the following terms:

"This case has been argued before us by counsel; we have considered it, and are of opinion,

"*First*, That the instrument dated 25th August 1819, executed by the said Margaret Langley, does not, as to the estates comprised in the said indenture of the 14th October 1786, and the said fine, operate at law as an execution of her power of appointment, but as a devise by her, by force of her interest.

"*Secondly*, This question does not arise. (*a*)

"*Thirdly*, We are of opinion that Thomas Langley, her son, took by descent from his mother, and not by purchase.

"(Signed)

R. DALLAS,  
J. A. PARK,  
J. BURROUGH,  
J. RICHARDSON."

"May 14th, 1822.

The cause now came on to be heard in this court.

Mr. *Hurt*, Mr. *Sugden*, and Mr. *Cooper*, for the plaintiff:—

1. The court must consider that the equitable interest in this estate has descended in the same course as if Thomas Langley, the son, had obtained a conveyance of the legal estate from the trustee in his lifetime.

\*There is no doubt of his right to have called for such a conveyance; [\*50] and if that right had been exercised—if Mr. Sneyd, the trustee, had executed a conveyance to him, the estate would have descended in a new line, and the heir *ex parte paterna* would now be entitled. Watk. on Descents, [181], 3d edit. 285. A conveyance, executed by the trustee would have the same effect as a feoffment and re-feoffment, which it is decided will break the course of the descent. During the life of Margaret Langley, the mother, there was no reason why the trustee should convey the legal estate, because his trust was to convey to such person as she should *by will* appoint.

Although it is impossible to deny that she had the equitable reversion in fee

(\*) It applied only in case it should be held that the instrument operated as an appointment.

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1822.—*Langley v. Sneyd and others.*

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in her, yet it may be contended that she was not entitled to call for a conveyance of the legal estate, during the pendency of her power; because, as her appointment must have been by *will*, it could not be complete till her death. Whether, if she had filed a bill against the trustee to compel him to convey the legal estate to her, the court would or would not have compelled him to do so, would depend on whether the power could be destroyed.

She did not, however, take any step to compel a conveyance, and, therefore, the trustee would not consider himself called upon to convey till after her death. But though the court should now be of opinion that Mrs. Langley might have compelled a conveyance, that would not operate against the claim of the plaintiff. For, the question is not, whether she could, by her own act, and by compelling a conveyance, have defeated the settlement which had been made; but whether it was any part of the trustee's duty to execute a

[\*51] \*conveyance of the legal estate in her lifetime. Granting that she might, by her own act, have defeated the trust by compelling him to convey, yet, as she did not do so, the question is, whether, at the moment of her death, it did not become the duty of the trustee to execute a conveyance? The trust reposed in him was to execute a conveyance to the appointee; and the greatest inconvenience would arise if the court should hold that, in a such a case as this, the construction should depend on the act of the trustee. That would be to put it in his power to give the estate to which line of heirs he pleased, in every case like the present, where the party entitled to call for the conveyance might happen to be an infant. If the trustee had executed a conveyance of the legal estate to the infant at the moment of Mrs. Langley's death, it would have vested in him as a purchaser, and, according to the authorities, would have descended *ut feudum novum*, and the plaintiff would have unquestionably been entitled as paternal heir. The court will, therefore, consider this case as if the trustee had done that which it was duty to do, and had executed a conveyance immediately on the death of Mrs. Langley.

II.—The case is much stronger, from the circumstance that Thomas Langley died an infant. Is there any authority to show, that, where a trustee has an estate on trust to convey, he is not bound to execute the conveyance in case the *cestui que trust* is an infant? If such a doctrine were to prevail, the consequence would be that every trustee would refuse to convey in such a case; because, if the infant were to die without maternal heirs, the trustee would hold the estate for his own benefit, although there were a thou-

[\*52] sand heirs *ex parte paterna*. In the present \*case, Thomas Langley, the son, through whom the plaintiff claims, was an infant at the time of his mother's death, and only lived a few weeks, so that he had no opportunity to call upon the trustee to execute a conveyance. It is established, by a long line of cases,<sup>(a)</sup> that, where there is a trust that money shall be laid out in land, or that land shall be converted into money, this court will consider the act as done which ought to have been done; and, unless there be some act to

(a) *Babington v. Greenwood*, 1 P. W. 532; *Baden v. Earl of Pembroke*, 3 Cha. Rep. 115; 2 Vern. 52; *Guidott v. Guidott*, 3 Atk. 254, &c.; *Ashby v. Palmer*, 1 Meriv. 296, &c. &c.

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divest the property of the character imposed on it by the trust, this court will follow the equity in all its devolutions. If, therefore, a man may thus, in the construction of a court of equity, impress on real estate the character of personality, and *vice versa*, without the performance of the express act which must have effected the conversion, why should not the court follow its own principle in a case like the present, and hold that a direction to the trustee to convey has the same effect as if the conveyance was actually executed, and impressed the same character on the estate as to the course of the descent? The case of *Burgess v. Wheat*(b) shows the effect of the legal estate being considered as remaining in the trustee.

A conveyance by the trustee at the moment of Mrs. Langley's death, would have let in both lines of heirs. The party himself being an infant, and, therefore, incapable of calling for a conveyance, the court will consider it as if the duty of the trustee had been performed. To hold the reverse would be to contravene \*an established rule of equity, and to exclude a whole [\*53] line of heirs.

III.—It has been decided, that, where the legal estate descendible to one line of heirs, becomes vested in the owner of the equitable estate descending in another line, there is no equity between the two lines of heirs; but the present case is quite different, and does not depend on any such equity. This is not the case of an equity attaching in a person by descent in one line, and claimed from him by a descendant in a different line; but the question here is, *who is entitled to call upon the trustee for a conveyance, the paternal or the maternal heir?* In *Goodright v. Wells*,(c) there is a clear admission that the decision there did not in any degree prejudice such a case as the present. Mr. Justice Buller, in that case, said, (Doug. 779,) after mentioning the case of the son having called for a conveyance, "as the mother died before he came of age, and she was not directed to convey till then, that case does not apply. We are to take the facts as they stand. To be sure, if he had taken the legal estate by purchase, the paternal heir would have been entitled; but, as he took it by descent from his mother, (and the case would have been the same if we suppose her to have lived beyond his age of twenty-one years, and that he never called for a conveyance) I think the trust was merged and gone." The difference in the present case is, that the time for conveyance had not arrived during the lifetime of the mother.

Mr. Bell, for the defendants, the heirs *ex parte \*materna*, was desired [\*54] by the court to confine himself to the point of infancy.

The words of the deed contain no direction to the trustee to convey, but only a declaration that he is to hold in trust for Mrs. Okeover and her heirs. The argument for the paternal heir must go the length of holding, that, if there was a conveyance to A. B. on trust for C. D., and C. D. were to die, leaving an infant heir, A. B. is bound instantly to execute a conveyance to the infant

(b) 1 Edm. 177, and 1 Bla. 123. (c) Doug. 771. See also *Selby v. Alston*, 3 Ves. 339.

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 1822.—*Swayne v. Smith.*


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heir. There is no authority for such a proposition. It has never been held, in any case, that a trustee, uncalled for, is bound to execute a conveyance to an infant, for the mere purpose of changing the line of descent; nor is there any principle on which such a decision could be made. The only color for such a proposition is derived from the principle of the court, that what ought to be done must be considered as if actually done. That principle only applies where there is an express duty, and a clear benefit to the party.(d) Surely an estate could not be vested in an infant by the act of the trustee, whether the infant would or not. If such a thing were done, the infant would have a right to say, when he came of age, that he would have nothing to do with the conveyance. It was the duty of the trustee to keep the estate in the same situation during the whole continuance of the infancy. The court never acknowledges any equity between two lines of heirs to alter the course of descent. It is by no means expressly decided that a conveyance of the legal estate will change the course of descent.(e)

[\*55] \*THE VICE-CHANCELLOR:—I fully adopt the certificate of the court of common pleas, that the son took by descent, and not by appointment. He took therefore, not under that provision of the settlement which directed the trustees to convey to the appointee of the mother, but under the subsequent trust of the settlement for the benefit of the mother and her heirs. As general trustees for the heir of the mother, they had no duty to clothe that heir with the legal fee, until they were required to do so; and, in this case, no such request was made to them on the part of the infant heir. If the heir had lived to be adult, and had afterwards died without requesting a conveyance, I consider it to be clear, even on the argument of the paternal heir, that the equitable fee which descended from the mother would have passed to the maternal heir.

I am of opinion that the death of the heir in his infancy, makes no difference. There is no equity between the different classes of heirs; and the equitable maternal fee must, in this case, go to the defendants, the maternal heirs.

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 [\*56]

\*SWAYNE V. SMITH.

 1822, 12th November.—*Construction. Will.*

Testatrix gave all her personal property to E. R. and in case E. R. married, and had a child or children, then to go to the heirs of E. R.; but in case E. R. should die without a child or children, and leave a husband, then the interest to him for life; and four legacies of stock to certain other persons. And if E. R. should die unmarried, then she gave several small legacies to other persons.

(d) See *Lord Compton v. Oxenden*, 2 Ves. jun. 261.

(e) It seemed, however, not to be much questioned in the present case, that where a party, entitled to an equitable estate by descent *ex parte materna*, procures a conveyance of the legal estate to himself, the equitable fee becomes merged in the legal, and that the estate will descend *ut feudum novum*, so as to let in the paternal heirs. See *Doe dem. Balch v. Putt*, Doug. 775, in note; *Goodright v. Wells*, Doug. 779; *Wade v. Paget*, 1 Bro. 363; and also *Watk. on Descents*, 3d edit. 301, and the cases there cited, by which this proposition seems satisfactorily established.

1822.—Swayne v. Smith.

E. R. died, without ever having been married.

Held, that the gift to E. R. was subject, in one event, to the legacies of stock, and, in another event, to the small legacies; and that, in the event which happened, the legacies of stock failed, but the small legacies took effect.

THE question in this cause was as to the construction of a clause in the will of Mrs. Mary Ray. By her will, dated 13th February 1787, after giving several pecuniary and specific legacies, she gave and bequeathed as follows:—

“*Item*, I give to my loving sister, Elizabeth Ray, all my ready money, securities for money, moneys in the public stocks or funds, plate, linen, china, and all other my goods, chattels and effects whatsoever and wheresoever; and in case my said sister, Elizabeth Ray, marries, and has a child or children, then to go to the heirs of my sister, Elizabeth Ray, but in case my said sister should die without a child or children, and leave a husband, then the interest of the above-mentioned money to her husband, during his natural life, provided he continues a widower, and no longer: Then I will and bequeath to my loving cousin, the Rev. George Swayne [one of the plaintiffs,] the sum of 360*l.* stock annuity, in the new four per cent consols and to his heir for ever. Likewise to my loving cousin, Walter Swayne, I will and bequeath the like sum of 360*l.* stock annuity, and to his heirs for ever. I will and bequeath to my loving cousin, William Ray, the sum of 360*l.* stock annuity, and to his sister, Arabella Carpenter Ray, the like sum of 360*l.* stock annuity: But if my said cousins, William and Arabella Carpenter Ray, die without issue, I then will and bequeath the aforesaid sums of 360*l.* each stock annuity, to the heirs of my first-mentioned cousin, George Walter Swayne:—If my sister, \*Elizabeth Ray, dies unmarried, I then will and bequeath as follows: [\*57] *Item*, To my much-esteemed friend, Anna Maria Phillips, I give my plate, linen and china, likewise 100*l.* principal money, now in Mr. James Lee Joynes’s hands: To my dear cousin, Sophia Joynes, I bequeath 100*l.* stock annuity in the new four per cent consols, provided she pay to my cousin Amey Edwards the interest of the sum during her life:—*Item*, I give to my cousin, Ann Mann, the like sum of 100*l.* stock in ditto, provided she pay to Barbara Watson 4*l.* per year during her life.” And she appointed her said sister, Elizabeth Ray, executrix of her will.

Elizabeth Ray proved the will, and acted as executrix. She died in 1821, without ever having been married.

Her executors filed this bill against the legatees of 360*l.* stock, and also against her residuary legatees, and the legatees of 100*l.* stock; and the bill prayed that the rights of the several parties might be declared.

Mr. Bell, and Mr. Palmer, for the plaintiffs.

Mr. Sugden, for the residuary legatees of Elizabeth Ray, contended, that according to the plain construction of the will of Mary Ray, Elizabeth took an absolute interest in the whole fund. According to the words of the bequest, the testatrix first gave to Elizabeth Ray an absolute interest. By the subsequent words, this absolute gift was not cut down; but it was provided that, in

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case certain events, which are specified, should take place Elizabeth should take subject to certain legacies. There is no construction of the will [\*58] \*by which it can be held that both classes of these legatees, those of 360*l.* stock, and the others of 100*l.* stock, are entitled, because the events in which they are given are different. The former were to take effect, only in case Elizabeth Ray should leave a husband, and no child or children; the latter, in case she should happen to die unmarried. The latter of these events has taken place, not the former, and therefore the 360*l.* stock legacies are not payable. *Smither v. Willock*,<sup>(a)</sup> *Harrison v. Forman*,<sup>(b)</sup> and *Sturges v. Pearson*,<sup>(c)</sup> are direct authorities against the construction that both classes of legatees can take. *Doe v. Roper*<sup>(d)</sup> is an authority, in the case of real estate, to prove that an absolute gift, such as in the present case, is not cut down by subsequent gifts, such as in the present case, which must be considered only as charges to take effect in certain events.

Mr. *Pemberton*, for the legatees of 360*l.* argued that their legacies were to take effect in case Elizabeth Ray died without a child or children, whether married or unmarried. The word "heirs" is never to be taken as synonymous with the word children. There is only one case, that of *Crawford v. Trotter*,<sup>(e)</sup> in which those words were held to be synonymous and it was so held there because the phrase was "heirs (say children)." In the present case there is nothing to show that they were intended to be synonymous. The inference is directly the reverse; for here the testatrix, wherevershe meant an absolute gift, gave to the party and "his heirs for ever." In this view of the case, [\*59] she meant to give Elizabeth Ray an estate for life,\* and to give the absolute interest only, in case she married, and had a child or children; for it is only when speaking of that event that she used the word heirs. The condition on which the legacies of 360*l.* stock were to take effect, was that of Elizabeth Ray leaving no issue, and not that of leaving a husband. *Murray v. Jones*,<sup>(f)</sup> *Jones v. Westcomb*,<sup>(g)</sup> *Doe v. Shepherd*,<sup>(h)</sup> are authorities to show that claims of this sort do not prevent the bequest over from taking effect. It would be monstrous to suppose that this testatrix, who manifested a clear intention to dispose of the whole of her property, should, nevertheless, in the event of Elizabeth Ray dying without ever having been married, leave it undisposed of except as to a few legacies of 100*l.* stock.

Mr. *Boteler* was for the legatees of 100*l.* stock, which, from the state of the assets, could not be paid in full, in case the court should hold that the 360*l.* stock legacies took effect.

Mr. *Sugden*, in reply:—It is clear this was meant an absolute gift to Elizabeth Ray, subject to the charge of certain legacies in certain events: because the words used in giving effect to those legacies which follow the first gift to Elizabeth, are all words of contingency, such as—but if, and in case. Words

(a) 9 Ves. 233.  
(c) 4 Madd. 361.

(b) 5 Ves. 207.  
(f) 2 V. & B. 313.

(c) 4 Madd. 411.  
(g) Pre. Cha. 316.

(d) 11 East, 518.  
(h) Doug. 75.

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 1822.—*Knye v. Moore.*


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cannot be more express to provide for different events than those which specify when the two different classes of legacies should take effect. *Jones v. Murray*, and the rest of the cases cited on the other side do not apply, because the question in them arose from the \*wills not containing any [\*60] words to describe certain contingencies which had happened.

The VICE-CHANCELLOR:—It is not very easy to find a satisfactory reason why the testatrix should have intended that the three legatees of the three sums of the 360*l.* stock should take if the sister died without child or husband, having been married, which would be the effect of this will; and that the same legatees should not take, if the sister died without child or husband, not having been married. But courts of justice are not at liberty to act upon conjecture, against the clear expressions of a will. And this lady has told us, in plain words, what legacies are to take effect in the event of her dying unmarried; and I cannot intend that she meant more than she has expressed. It may be, that, in this construction, I am not executing the purpose of this testatrix. But the security of property requires rather that a possible purpose should be disappointed, than that courts of justice should act upon any supposed intention which is not to be collected from the language of the will. [1]

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\**SOPHIA KNYE*, spinster, and *HENRY KNYE* and *CHARLES KNYE*, infants, [\*61]  
by the said *SOPHIA KNYE*, their mother and next friend, plaintiffs; and  
*JOHN MOORE*, defendant.

1822, 13th November.

A married man, after having lived in adultery with a woman, and had children by her, executes a deed, providing for her and the children in case of his death, and deposits it in the hands of his attorney, but afterwards procures possession of it himself. Held, on demurrer, that the woman and her children can maintain a bill to compel him to deliver up this deed: that the person with whom the deed had been deposited need not be made a party, as no breach of trust was charged against him; and that the bill was not multifarious, though it also sought performance of an agreement to pay an annuity to the woman, which could not be decreed in equity.

THE bill stated, that the plaintiff, *Sophia Knye*, became, in the year 1808, servant to the defendant, and for four years conducted herself with strict pro-

[1] Every will, duly executed, is to be carried into effect, if not contrary to the rules of law; as, that the testator, or deviser shall not create an estate tail—establish a perpetuity—endow a corporation with real estate, &c. But, when the intention is clearly ascertained—which may be stated in such explicit terms, as in the case in the text, as can leave no doubt, or is to be gathered from a construction of the whole will, it must prevail. See the American cases, *Amer. Ch. Digest*, Devise, X. 4 *Kent's Comm.* 534, 535. The learned commentator on American law, admits that the attempt to examine cases at large would “be impracticable from the number of them;” and he concludes, after remarking upon the unskilful manner in which wills are frequently drawn; that “adjudged cases become of less authority; and are of more hazardous application than any other branch of the law.” This will be a sufficient excuse for the editor's not enlarging upon cases of this description.



1822.—Knye v. Moore.

priety: that, in the year 1811, some differences having arisen between the defendant and his wife, the defendant began to pay very particular attention to the plaintiff, S. Knye, and proposed to her to cohabit with him: that she at length yielded to his solicitations, and agreed to his proposals: that, in 1812, defendant fitted up a cottage in the neighborhood for her, where she resided and cohabited with him until some time in the year 1816, and in the course of such cohabitation was delivered of four children, of whom the defendant was the father, namely, the plaintiffs Henry and Charles, and two other children since dead: that in the year 1816, the defendant having several legitimate children, became desirous of putting an end to the connection, and of making a due provision for the plaintiff, Sophia Knye, and the other plaintiffs, her children; and, for that purpose, wrote and sent a letter to her, dated 21st August 1816, whereby he informed her that his absence from England, which would take place immediately, made their separation necessary; and requested her to quit the cottage, and assured her that so long as the children were maintained at her expense, and her conduct justified her claim upon him, she should be [\*62] provided for by an allowance of 100*l.* a year, \*to be paid by his bankers; and that, if any accident happened to him, she and the children were provided for by a deed executed by him, and left in trust with his attorney, Mr. H.: that being extremely desirous of putting an end to the connection, she agreed to quit the cottage, and accept the provision; and that, in pursuance of the agreement, she gave up possession of the cottage, and accepted the provision of 100*l.* a year, and that she had, ever since August 1816, wholly supported her children, and conducted herself with propriety: that the defendant, for a short time after entering into the agreement, remitted to her, from time to time, various sums of money, on account of the promised provision; but that, since July 1820, he had ceased to pay her any sum on account thereof, and had also procured the deed, mentioned to have been executed by him, for the benefit of her and her children, to be delivered into his custody or possession; and that he refused to deliver up the same, or to discover the contents thereof.

The bill charged, that it was fully agreed between the defendant and the plaintiff, Sophia Knye, for the purpose of putting an end to the connection between them, that the defendant should, during his life, pay her the annual sum of 100*l.* as a provision for the support and maintenance of herself and children, and that the letter above mentioned contained the terms of this agreement; and that the agreement, was by the letter, duly reduced into writing, and was, in equity a good and valid agreement, on the part of the defendant, to pay to the plaintiff, during his life, the annual sum of 100*l.* and that the payments made by him were acts of part performance of the agreement.

[\*63] \*The bill prayed a specific performance of this agreement, and that the defendant might be decreed to pay to the plaintiff, S. Knye, the arrears and future payments of the annuity, during his life she being willing to support

1893—Kyne v. Moore.

and maintain the children; and that the defendant might be decreed to deliver up the deed, and that it might be deposited in safe custody.

To this bill the defendant demurred, for want of equity.

Mr. Bell, and Mr. Lobat, in support of the demurrer:—

*First.* This is not one of those cases where a man, having debauched a woman, makes a provision for her; but this is the case of a married man, and comes within the doctrine laid down in *Priest v. Parrott*. (a) That case has been cited in the house of lords, and the doctrine of lord Hardwicke acknowledged; it was also cited to the master of the rolls in *Matthews v. L.*, (b) and not objected to. There is no case in which this court has held a deed like the present, made by a married man, to be valid. (c)

*Secondly.* The demurrer is also sustainable *ore tenus*, for multifariousness. The first part of the bill states an agreement with the mother only, by which she was to receive 100*l.* a year, in consideration of former cohabitation. As to this, she alone is entitled to sue; she cannot join to that claim another in which she and other persons are jointly interested; for, as to the other matters, she claims jointly with her children.

*\*Thirdly.* Another ground of demurrer is, that, if they come here [\*64] for his deed, the person in whose hands the bill states the deed to have been deposited, ought to have been a party to this suit.

Mr. Evans, in support of the bill, said that this case was distinguished from *Priest v. Parrott* by the circumstance of there being children, who are innocent parties.

**THE VICE-CHANCELLOR:**—The agreement contained in the letter stated in the bill, must be considered as merely voluntary, therefore, a bill will not lie for the performance of it.[1] But it is a very different question, whether the defendant must not answer as to the deed of settlement, which he is alleged to have executed and delivered to a trustee for the plaintiffs, and, afterwards, to have improperly obtained again from the trustee.

It seems to be established by the case of the *Marchioness of Annandale v. Harris*, (d) (which afterwards went to the house of lords,) and by *Ord v. Blackett*, and *Carew v. Safford*, there cited, that courts of equity will lend their aid to enforce securities given as the *præmium pudicitiae*. [2] Lord Hardwicke states (e,) that, in *Annandale v. Harris*, it appeared that Lord Annandale was not married at the time of his connection with the defendant. No such circumstance is stated in the report, nor does it appear to have formed

(a) 2 Vez. 160.

(b) 1 Madd. 558.

(c) See *Spicer v. Hayward*, Precedents in Chancery, 114, and the *Marchioness of Annandale v. Harris*, 2 P. W. 432, and 3 Bro. P. C. 445.

(d) 2 P. W. 432, and 3 Bro. P. C. 445.

(e) 2 Vez. 161.

[1] A letter may be construed as a testamentary distribution of property, *Storrell v. Dickey*, 1 Johns. Ch. Rep. 153. This case is cited, merely as it may have some bearing upon the question of the *præmium pudicitiae*.

[2] But not as to future cohabitation. *Winsbrunner v. Weisiger*, 3 Mun. 35.

1822—Gorton v. Smart.

any ingredient in the decision. The principle of that case is, that, if a man misleads an innocent woman, it is but justice and reason that he should make her reparation; and therefore, notwithstanding the immorality of [\*65] the \*conuection which led to the provision, a court of equity will lend its aid to enforce it. If a woman be the victim of a married man, it is not less justice and reason that he should make her reparation than if he were unmarried; and the deepershade of immorality in the conuection is not a very tangible or satisfactory ground of distinction.

In the case of *Priest v. Parrott*, there were no children. Now here, in the first place, the deed is a provision for the mother and her children, and they are co-plaintiffs; and if I were to decide that the mother could not maintain this bill, there is no principle that the children could not. The case of the children here makes it quite clear that this general demurrer cannot be maintained.

It is then said, that there is a defect of parties; because the person to whom the deed was delivered is not before the court.

If the trustee had delivered up the deed in breach of his trust, then he ought to have been before the court, in order to be charged in respect of such breach, but not otherwise.

Another objection is taken to the bill, as being multifarious; because it seeks for the performance of an agreement under which the mother alone is entitled, and joins to this another claim, in which she is interested jointly with her children. But the whole case of the mother being properly the subject of one bill, the suit does not become multifarious because all the plaintiffs are not interested to an equal extent.

Demurrer overruled (e).

[\*66] \*GORTON v. SMART and COOKE.

1822, 14th November.—*Specific Performance. Nuisance.*

Specific performance of an agreement to grant a building lease, decreed generally although the plaintiff had built a brew house upon part of the land comprized in the agreement, and thereby injured the adjoining property of the lessor.

(e) See *Geay v. Mathias*, 5 Ves. jun. 286, and *Binnington v. Wallis*, 4 B. & A. 650. [Vide S. C. 2 Sim. & Stu. 250. Where the bill having been amended, a case was ordered to be stated for the opinion of the court of common pleas, S. C. in a further stage, under the name of *Nye v. Moseley*, 2 Sim. 161. This case is frequently referred to in relation to the complicated subject of multifariousness. It will not be attempted to deduce any general rule from them; yet a reference to some few of the cases, bearing upon the subject may be useful, *Delandre v. Shaw*, 2 Sim. 237. *Dunn v. Dunn*, 2 Sim. 329. *Maud & wife v. Acklom*, 2 Sim. 331. *Shackell v. Macaulay*, 2 Sim. & Stu. 79. *Salvidge v. Hyde*, Jacob 151. *Dew v. Clark*, post, 108. *Turner v. Robinson*, post, 313. *Marcos v. Pebrez*, 3 Sim. 466. *Pearse v. Hewitt*, 7 Sim. 471. *Campbell v. Mackay*, 7 Sim. 564. S. C. Mylne & Craig, 603. Other authorities are cited in Story's Eq. Plead. 306. For the American cases, see Amer. Ch. Digest, Pleading, Bill, III. It may be inferred that the only proper mode of taking advantage of multifariousness is by demurrer; see *Grove v. Fresh*, 9 Gill & John. 280.

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1822.—Gorton v. Smart.

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This was a bill for the specific performance of an agreement to grant a building lease.

In March 1819, articles of agreement were entered into between Cooke and Smart, by which Cooke, in consideration of the covenants, conditions and agreements therein contained, agreed to demise to Smart, for a term of ninety-nine years, at a yearly rent of 300*l.* a piece of ground in Lambeth, for the purpose of building; and it was agreed on the part of Smart, that all the houses which he or his assigns should think fit to build, or cause to be built on the ground, should not be less than those usually denominated third and fourth rate houses; and that all the timber or wood used in the said houses or buildings should be of such scantling or demensions as are used in good and well built houses of the corresponding rate: that the leases to be made of such houses should contain all covenants, clauses and agreements usual in leases of the like nature, and such other covenants and clauses as should be agreed upon between the parties (Cooke and Smart) from time to time, for the advancement and improvement of the undertaking, and of the estate of Cooke.

These articles contained other provisos, in none of which, however, was there any thing further expressed as to the nature of the house to be built. But where reference was made to the houses proposed to be built, the words "houses or buildings," and in one instance "messuages or tenements," were used. There was also a proviso, empowering Cooke, his heirs and assigns and his and their agents and surveyors, to enter\* upon the [\*67] ground agreed to be demised, to examine and inspect any of the buildings that should be carrying on, and to take such minutes of the state thereof, as they should think fit.

Under this agreement, Smart entered into possession of the ground, and in May, 1820, signed an agreement with the plaintiff, Gorton, to underlet to him a small part of it for a term of ninety-seven years, at a yearly rent of £14, for the purpose of erecting buildings intended for a small brewhouse, and to grant him a lease which should contain the customary clauses, when the intended buildings were finished.

The plaintiff entered into possession under this agreement, and built the brewhouse. He then applied for his lease; but Cooke insisted that it was contrary to the terms of his agreement with Smart that any brewhouse or manufactory should be erected on the land, and objected to grant the lease, because the erection of a brewhouse was injurious to his property in that neighborhood. But at the same time he offered to grant a lease to the plaintiff, provided he would adopt the requisite means for consuming the smoke occasioned by the brewery, so as to prevent it from being obnoxious to the neighborhood. The plaintiff refused to adopt the means of consuming the smoke, and filed this bill, praying for a specific performance.

It was insisted by the bill, that Cooke was aware of the agreement between the plaintiff and Smart, and did not object to the erection of the brewhouse till it had been completed, although he knew the nature of the building while it

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 1822.—*Vezey v. Jamson.*


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[68\*] was in progress. But this was \*denied by Cooke in his answer; and the evidence of the plaintiff only proved that Cooke lived in the neighborhood and might have known the nature of the building before it was completed.

On the part of Cooke, it was proved that his property in houses in the neighborhood would be depreciated by the erection of this brewhouse.

The cause now came on to be heard.

Mr. *Horne* for the plaintiff.

Mr. *Sugden*, and Mr. *Munro*, for the defendant Cooke, insisted, *First*, that a brewhouse was not a building within the terms of the agreement; *Secondly*, that the plaintiff having rejected the offer of a lease on the condition of his adopting the means for preventing the brewhouse from being a nuisance and a damage to the defendant's property, was not entitled to a lease on any other terms; *Thirdly*, that it was proved that the brewhouse, as now used was an injury to the property of the defendant.

The VICE-CHANCELLOR:—There is no covenant in the agreement to restrain the building of a brewhouse. A brewhouse is not necessarily a nuisance, and if it be so used as to become a nuisance, the law is open to the defendant.(a)

Decree for a specific performance.

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[\*69]

\*VEZEY V. JAMSON.

1822, 22d July: 19th November.—*Trust.*

Testator gives the residue of his estate to his executors on trust, in default of appointment, to dispose of it at their pleasure, either for charitable or public purposes, or to any person or persons, in such shares, &c. as they in their discretion should think fit: held, that the trust is too general and undefined to be executed by the court: that the executors cannot take, because it is given expressly on trust; and that the next of kin are entitled.

THIS suit was instituted to obtain the opinion of the court as to the disposition of the residuary estate of John Vezey.

By his will, dated 5th December 1814, which was executed so as to devise freehold estates, after disposing of his real property, and giving various pecuniary legacies (one of which was to a charitable institution) he gave all the residue of his estate to his executors, upon special trust and confidence, nevertheless, to apply and dispose of the same in or towards such charitable or public uses or purposes, person or persons, or otherwise, as he might, by any codicil or codicils to that his will, or by memorandums in his own handwriting, direct or appoint, and as the laws of the land would admit of, and, in default of any such directions or appointments, then, as to the whole residue, or in case of any such directions or appointments, and the same should not be an

(a) See *Williams v. Cheney*, 3 Ves. 59. [S. P. acc. *Wingfield v. Crenshaw*, 4 Hen. & Munf. 474.]

1822.—*Vezey v. Jamson.*

entire disposition of such residue, then, as to such part of such residue concerning which no such direction or appointment should be made, upon trust, to pay and apply the same in or towards such charitable or public purposes as the laws of the land would admit of, or to any person or persons, and in such shares and proportions, sort, manner and form, so as his executors, or the survivor of them, or the executors or administrators of such survivor, should, in their or his discretion, will and pleasure, think fit, or as they should think would have been agreeable to him, the said testator, if living, and as the laws of the land did not prohibit, but admit of.

\*The testator never by any codicil or memorandum specified any [\*70] purpose to which the residue was to be applied.

The plaintiff, as next of kin, claimed the residue as undisposed of; and, on behalf of the attorney general, it was insisted, that it must be applied to charitable purposes, under the direction of the court, pursuant to the wishes of the testator.

When the cause first came on to be heard, the Vice-Chancellor referred it to the master, to inquire who were the next of kin of the testator at the time of his death, that they or their representatives might all be made parties to this suit.

This was done accordingly; and on the 22d July 1822, the cause was heard for further directions.

It did not appear by the pleadings whether any of the next of kin were legatees or devisees under the will or codicils.

Mr. Bell, Mr. Shadwell, and Mr. Trower, appeared for the various parties. (a)

The question was, whether the residuary estate was well given to charitable uses, or belonged to the trustees for their own use, or to the next of kin.

The following cases were cited in the course of the argument, *Morice v. Bishop of Durham*, (b) *Attorney General v. Herrick*, (c) *Price v. Peacock*. (d)

\*The VICE-CHANCELLOR:—In the event of no appointment of this [\*71] residuary estate by the testator himself, he has given it to trustees to dispose of it at their will and pleasure, either for charitable purposes or public purposes, or to any person or persons, in such shares and proportions, sort, manner and form, as they in their discretion shall think fit, and the laws of the land shall not prohibit. It is in effect a gift in trust, to be absolutely disposed of in any manner that the trustees think fit, which is consistent with the laws of the land, and so that it be not applied for their own use and benefit.

The testator has not fixed upon any part of this property a trust for a charitable use, and I cannot therefore devote any part of it to charity. He has given it to the trustees expressly upon trust, and they cannot therefore hold it for their own benefit. The necessary consequence is, that the purposes of the trust being so general and undefined that they cannot be executed

(a) As the cause was heard in July last, we have no note of the argument.

(b) 9 Ves. 399, and 10 Ves. 522. (c) Amb. 712. (d) Finch, 445; 2 Lev. 267.

1822.—*Balfour v. Farquharson.*

by this court, they must fail altogether, and the next of kin become entitled to the property. The case of *Morice v. Bishop of Durham* is precisely in point.(e)

[\*72]

\*BALFOUR v. FARQUHARSON.

1822, 20th November.

A defendant who has put in three insufficient answers, and is in custody for want of a fourth, is entitled to his discharge immediately on filing a fourth answer.

IN this case, the defendant had put in three insufficient answers, and, for want of a fourth, he was committed to the fleet.

Mr. *Daniel* moved for his discharge, upon the six clerk's certificate, that a fourth answer had been filed; and cited Lord Bacon's Orders, Beames's Orders Chan. 28, and Lord Clarendon's Orders, Ib. 183, and *Bailey v. Bailey*.(a)

Mr. *Agar* opposed the motion, and cited an order of the 30th April 1700,(b) and contended, that under that order the defendant was to be kept in custody until the master had reported the fourth answer to be sufficient.

The registrar, on being applied to by the Vice-Chancellor, stated, that there was no instance of the order of 1700 having been acted upon, and that the practice had always been conformable to Lord Clarendon's Order.

The Vice-Chancellor directed the motion to be made before the Lord Chancellor.

Shortly afterwards Mr. *Daniel* returned, and stated to the court, that the Lord Chancellor had said, that, if his Honor was satisfied that the order of 1700 had never been acted upon, he would not be the first to act upon it.

The VICE-CHANCELLOR :—Then take your order.[1]

(e) See *Mills v. Farmer*, 1 Meriv. 55, and 19 Ves. 483, and the cases there cited. In the *Attorney General v. Doyley*, 7 Ves. 58, *in not*.—The testator gives real and personal estate to trustees, in trust, (failing other limitations) to dispose thereof to such of his relatives of his mother's side who were most deserving, and in such manner and proportion as his trustees should think fit; to such charitable uses as they should think most proper and convenient. The court decreed one moiety to all the relations on the mother's side, within the degree of third cousins; and the other moiety for charitable purposes; and directed the master to approve a scheme in which the poor relations, not partakers of the first moiety were *cateris paribus*, to be preferred. See *Moggridge v. Thackwell*, 7 Ves. 36, and the cases there referred to. [A trust in favor of a charity, must be definite, both as to the persons to be benefited, and the subject of the trust. 2 Story's Eq. 405, 426. *Baptist Association v. Harfs. Ex'rs*, 4 Wheat. 1. *Ommanney v. Butcher*, 1 Turn. & Russ. 260. *Fowler v. Garlike*, 1 Russ. & Mylne, 232. *Ellis v. Selby*, 7 Sim. 352 S. C. affirmed by Lord Cottenham, 1 Mylne & Craig, 286. Where the trust is too vague for the court to execute, the next of kin are entitled: Cases, *supra*.]

(a) 11 Ves. 151. (b) First published by Mr. Beames, Ord. Cha. 317.

[1] Affirmed 1 Turner, 184. Vide Amer. Ch. Digest, Practice, VII.

1822.—Johnson v. Aston.

\*JOHNSON v. ASTON.(a)

[\*73]

1822, 20th November.

Money admitted by an executor to be in the hands of his partner, is in his own hands for the purpose of being ordered to be paid into court.

MOTION to pay money into court, on admission in the answer of the defendant, an executor.

The defendant was a partner in a mercantile house at Trinidad, and a bill of exchange had been drawn on his house for the money in question, in favor of the testator, by a party, who, it was admitted, had the amount of the bill in the hands of the partnership. The bill was long over due, and the defendant, by his answer, admitted that his partner in Trinidad, had debited the drawer with the amount of the bill, though the money had never been actually remitted.

The VICE-CHANCELLOR:—The money of the executor, admitted to be in the hands of the banker, is in his own hands for the purpose of such an application as the present. The partnership are to be considered as the bankers of the executor. The fact that the money is abroad is a reason for giving a longer time for payment into court.[1]

\*BRYSON v. WHITEHEAD.

[\*74]

1822, 25th November.—*Restraints on trade.*

A trader may sell a secret in his trade, and restrain himself generally from the use of it. Specific performance decreed of an agreement to sell the good will of a trade, and the exclusive use of a secret in dying.

THIS was a bill for the specific performance of an agreement, for the sale of the good will of a trade, and of a secret in dying.

The plaintiff had for many years carried on the trade of a dyer in Spital-fields, and had a particular mode of dying bombazeens and stuffs. None but himself and his son-in-law, one Portlock, knew the secret of dying stuffs in that mode; and this secret was esteemed of great value.

In December 1820, Bryson being about to retire from business, agreed to sell the good will of his trade, together with the plant and fixtures, to the defendant for 1,500*l.*, and the exclusive benefit of the secret for 1,000*l.* Heads of the agreement in writing were signed by both parties, and were expressed

(a) *Ex relations.*

(1) Vide 2 Story's Eq. 139, *Rothwell v. Rothwell*, 2 Sim. & Stu. 217. That infants are concerned is an additional reason for making the order. *Orrell v. Binney*, Jac. 523. As to incidental motions in a cause, vide *Marriott v. White*, ante 17, et not. ibid.



1822.—Bryson v. Whitehead.

as follows: "Heads of agreement between Mr. Bryson, of, &c. and Mr. John Whitehead, of, &c. Mr. Bryson possesses a secret in the art of dying bombazeens, princes stuffs, and other goods, which is known to himself and son-in-law, Samuel Portlock, only: Mr. Bryson is about to retire from his business, and therefore he has agreed with Mr. Whitehead as follows: Mr. Whitehead is to pay him, for himself and son, 1,000*l.* for the secret, and 1,500*l.* for the plant and fixtures upon his premises, and for the good will of the trade, and to have the premises leased or assigned at the following rents: [then followed a description of the buildings, and the amount of the rent.] Mr. Bryson to make the secret known to Mr. Whitehead, and instruct him in [\*75] the art, and to \*make over the trade and good will, and use his endeavors to secure it to Mr. Whitehead, by circular letters, and other usual means; and he is not himself to engage in the business of a dyer for twenty years; and he is to engage that his son-in-law will not divulge the secret, or engage in the business of a dyer for the same term as Mr. Bryson; and that neither of them shall do any thing to prejudice Mr. Whitehead in the trade of Mr. Bryson, and in securing and continuing the business of the connections of Mr. Bryson; and he is to procure his son-in-law to enter into an engagement to the same effect to Mr. Whitehead: an inventory of the plant to be delivered, &c. Possession to be delivered to Mr. Whitehead on payment of the 1,000*l.*, and a circular immediately issued, so that the trade may be continued in the usual manner, under the direction of Mr. W., with the assistance of Mr. Bryson, who is to divulge the secret, and instruct Mr. W. therein immediately after the payment of the 1,000*l.*: the 1,500*l.* to be paid upon the leases, &c. being executed according to this agreement, which are to be executed within a month, or sooner: deeds and instruments with full and proper clauses, to be prepared and executed upon the basis of this agreement, and the expense divided."

Whitehead forthwith paid the 1,000*l.* and was put into possession of the trade, and had the secret communicated to him.

Bryson and his son-in-law soon afterwards executed a bond to Whitehead in the common form, with a penalty of 2,000*l.* reciting the agreement, and with the condition, that they or either of them would not, for twenty years, [\*76] in any manner exercise the trade of dyers \*within the distance of fifty miles from Spitalfields, and would not, at any time, disclose the secret.

Whitehead, however, thought that this bond (which was prepared by Bryson's solicitor) was not sufficiently restrictive, and that Bryson and his son might, at any time, without incurring any penalty, resume their trade at any place beyond the distance of fifty miles from London; as at Kidderminster, Norwich, or in Yorkshire, where bombazeens and stuffs are principally manufactured. For this reason he insisted on a deed of covenant more restrictive in its terms, and with clauses for liquidated damages in case of breach of the agreement.

Disputes arose in consequence, as to the terms of the deeds to be executed

1822.—*Bryson v. Whitehead*.

under the agreement, and Bryson filed this bill for a specific performance, and for payment of the 1,500*l*.

*Mr. Heald*, and *Mr. Whitmarsh*, for the plaintiff.

*Mr. Bell* and *Mr. Theobald*, for the defendant, submitted it to the judgment of the court, whether the agreement was of such a kind as could be carried into execution. It was the essence of the agreement that neither Bryson nor his son-in-law should, for twenty years, carry on the trade of dyers. If, however, the agreement was to be acted on so as to confine the restriction on exercising the trade to places within fifty miles from London, then the defendant would not have that benefit which he had stipulated for by the agreement; because the plaintiff, or his son-in-law, by removing to Norwich, or any other convenient situation beyond the distance of fifty miles, would come \*into direct competition with him. If considered as an agreement not [\*77] to exercise the trade of a dyer any where for twenty years, it was void by the policy of law, *Mitchell v. Reynolds*. (a) If, on the other hand, it was to be acted on so as to limit the restraint on carrying on the trade to the distance of fifty miles from London, the defendant would lose the benefit for which he had contracted.

THE VICE-CHANCELLOR :—Although the policy of the law will not permit a general restraint of trade, yet a trader may sell a secret of business, and restrain himself generally from using that secret. Let the master, in settling the deed which is to give effect to this agreement, introduce a general covenant to restrain the use of the secret for twenty years, and a limited covenant, in point of locality, as to carrying on the ordinary business of a dyer, both parties being willing that the agreement should be so modified.

The decree therefore referred it to the master to settle a proper deed. (b)

(a) 1 P. W. 181.

(b) It is a very ancient part of the policy of the law to discourage restraints on trade, as being injurious to the public. But no judge has carried his abhorrence so far as is reported of Hull, J. in the Year Book, 2 Hen. 5. There a dyer was bound that he should not use his craft for two years, and Hull held that the bond was against the common law, "and by G—d (said he), if the plaintiff were here, he should go to prison till he had paid a fine to the king." In *Mitchell v. Reynolds*, 1 P. W. 181, Parker, C. J. in his admirable exposition of the laws on this subject, excuses the transport of Mr. Justice Hull's indignation, on the ground that it was excited by a case of most gross fraud and villainy. As to the general doctrine, see *Davis v. Mason*, 5 T. R. 118; *Chesman v. Mosely*, 1 Bro. P. C. 234; *Shackle v. Baker*, 14 Ves. 468; *Cruttwell v. Lye*, 17 Ves. 335; *Harrison v. Gardner*, 2 Madd 198, &c. [Vide 2 Story's Eq. 29; as to agreements in restraint of trade. See further, 1 Story's Eq. 289. *Neah v. Webb and others*, 1 Edw. 604. An association formed to buy and sell public lands of the government, and prevent a competition, is void. *Carrington v. Caller*, 2 Stewart, (Alabama,) 175.

1822.—*Bayley v. Snelham.*

[\*78]

\*BAYLEY v. SNELHAM.

1822, 19th and 26th November.—*Description of illegitimate child.*

J. S. having contracted a marriage, which was void *ab initio*, and having one son of that marriage, made his will, and gave the residue of his personal estate to all his children by his reputed wife: Held, that the son, being born at the date of the will, was entitled.

THIS was a bill filed to carry into execution the trusts of the will of John Snelham: and the only question in the cause was, as to the validity of a bequest to the children of the reputed wife of the testator.

The will was dated 21 August 1800: and the testator, after reciting, that he had lately married Jane Whiteside, the sister of his deceased wife, Mary Snelham, in Scotland, according to the form and usage of the church there, gave and bequeathed unto his wife, Jane Snelham, all his household goods, plate, linen, china, books and wearing apparel; and he gave the residue of his personal estate to Thomas Bayley and Thomas Whiteside, their executors, administrators and assigns, upon trust, to sell, and to place out the produce at interest, and to apply the interest and proceeds thereof unto his wife Jane, for her natural life; and, from and after her decease, to call in the principal moneys so to be placed out, and to pay and apply the same unto and amongst all and every the child and children, or to an only child, as the case might be, of him the said testator and his wife Jane, the whole of the said trust moneys to be paid to such child or children at his, her, or their age or respective ages of twenty-one years, or day of marriage; and upon trust, in the mean time, after the decease of his said wife, to pay and apply the dividends, increase and proceeds thereof, for and towards the maintenance and education of such children

or child, until their or his or her respective shares or share should be-  
[\*79] come payable. And the \*testator declared it to be his will and mind, that his wife Jane, and her children, should take the provisions therein before made for them in the same manner as if she had been married to him according to the usage of the church of England, and such marriage had been valid according to the laws of England. And in case all and every the child and children by him begotten, and to be begotten on the body of his said wife, Jane, should happen to depart this life under the age of twenty-one years, and unmarried, then he gave one moiety of the trust moneys, unto his said wife Jane, her executors, administrators and assigns; and he directed his trustees, and the survivor of them, and the executors and administrators of such survivor, to pay and apply the interest and proceeds of the remaining moiety of the trust moneys unto his sister, Ann Goodyear, during her natural life; and from and after her decease, then he gave and bequeathed the same moiety unto and equally amongst Richard, Elizabeth, Mary, and Ann Goodyear, the four children of his sister Ann Goodyear, share and share alike.

At the time when the testator made this will, he had one son by Jane Snelham. This son was the only issue of the marriage.

1822.—*Bayley v. Snelham.*

The bill charged, that the marriage of the testator with Jane Snelham, the sister of his former wife, was, according to the law of Scotland, not merely voidable, but absolutely void, *ab initio*.(a)

\*Ann Goodyear, the legatee for life of the residue, failing the preceded- [\*80] ing limitations, was a party to the cause in that character, as well as because she was the personal representative of three of her children named in the bill, who were dead. Her only surviving child had married, and, with her husband, was made a party to the cause.

By their answer, these parties stated, that they were willing to admit, and did thereby admit that Jane Snelham was lawfully married to the testator, and that John Snelham was the lawful son of the testator; and they said, that they had never set up any claim under the will, in the events that had happened; nevertheless, if the court should be of opinion that they had any interest under the will, and were, therefore, necessary parties to the suit, they claimed all such rights and interests therein as they might be entitled to.

The cause now came on to be heard.

Mr. Heald, and Mr. Rose, for the plaintiffs, who were the representatives of the acting executors of the will.

Mr. Bell, and Mr. Roupell, for John Snelham and his mother, insisted, that, as John Snelham was born at the time when the will was made, there was a sufficient description of him in the will, even if it should turn out that the marriage was void, *Wilkinson v. Adam*.(b) If \*they were right in [\*81] that construction, it would not be necessary to direct any inquiry as to the validity of the marriage.

Mr. Pemberton, for the other legatees.

The VICE-CHANCELLOR :—In the case of *Wilkinson v. Adam*, the words of gift were, “to the children which I may have by the aforesaid Ann Lewis, and born at my decease, or six months after.” It was held to be equivalent in expression to a gift to, “all the children which I now have, or hereafter may have by the said Ann Lewis, who shall be living at my decease, or born within six months after;” and, consequently, to be a sufficient description of the children of Ann Lewis, living at the time of the will, who had acquired the reputation of being the children of the testator.

(a) This marriage, by the law of Scotland, was null and void. “Marriage is null where it is contracted within the degrees of propinquity or affinity forbidden by the law.” Ersk. Inst. 92. sec. 97.

“The degrees prohibited by the law of Moses in consanguinity are in every case virtually prohibited in affinity; and by the act 1567, the prohibition is equally broad in the degrees of affinity, as in those of consanguinity.—Thus, one cannot marry his wife’s sister, more than he can his own. In all this matter, the rules are the same by the law of Scotland, whether the parties be related by full or by half blood.”—Ersk. Inst. 93, sec. 9. [“The canon and common law made no distinction on this point between connexions by consanguinity and affinity.” 2 Kent’s Comm. 82. Good sense, and sound ethics have however drawn the distinction. See further as to incestuous marriages; id. 81, to 84.]

(b) 1 V. & B. 422.

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 1822.—In the Matter of a Friendly Society.
 

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This case is stronger for the children than that of *Wilkinson v. Adam*, being an express gift to all the testator's children by the said Jane, begotten or to be begotten, and necessarily, therefore, including the child of Jane, then born, who had acquired the reputation of being the child of the testator.

Decree, that John Snelham is entitled.(c)

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[\*82]

\*In the Matter of a FRIENDLY SOCIETY.

1822, 27th November.

A sum of money in the funds, standing in the name of two trustees of a friendly society, one of whom had absconded, ordered to be transferred by the other trustee into his own name, jointly with that of another trustee, elected in the room of him who had absconded.

THIS was the petition of the president, stewards, and John Allen, one of the trustees of The Firm and Friendly Society.

It stated that the petitioner, John Allen, and one John Burghall, had been elected joint trustees of the Society, and that a sum of 100*l.* 3*l.* per cent stock was standing in the books of the bank of England, in their joint names: that John Burghall had absented himself from the society, and that his then place of residence was wholly unknown, and that, in consequence of his absence, the president had been elected joint trustee with John Allen, in the room of Burghall. The petition therefore prayed that the sum of 100*l.* stock might be transferred into the names of the president and John Allen.

There was an affidavit of these facts.

Mr. *Farrer*, for the petition, referred to the act 36 Geo. 3, c. 90, by which it is provided, that where one of several trustees is absent out of the jurisdiction, or shall be bankrupt, or lunatic, or shall refuse to transfer, or it shall be uncertain or unknown whether such trustee be living or dead, the courts of equity may, in any cause depending, make an order of transfer by the other or others of such trustees. By the act 57 Geo. 3, c. 89, intitled, "an act to extend the provisions of the 36th Geo. 3, c. 90, and the 52d Geo. 3, c. 158, to

(c) In *Wilkinson v. Adam*, 1 V. & B. 422, the doctrine on this subject, and the various authorities, were very fully discussed. See also *Swaine v. Kennerley*, 1 V. & B. 469. *Woodhouselee v. Dalrymple*, 2 Meriv. 419. [A will must be construed throughout, as it should have been at the instant of the testator's death. *Wilkes v. Lyon*, 2 Cow. 333. If a present vested interest in property, is devised to a class of persons, none but those who are *in esse*, so as to answer the description in the will at the death of the testator, are included in such class as devisees. *Lorillard v. Coater*, 5 Paige, 172. The question of the description of illegitimate children, in a will, arose in the subsequent case of *Mortimer v. West*, 3 Russell, 370. Without entering into the facts of the case, it will be sufficient to extract a few passages from the opinion of the Lord Chancellor. "Where there is a bequest to children generally, legitimate children must be meant, unless it is shown by something amounting to necessary implication, that the testator intended that illegitimate children should take. A bequest to unborn illegitimate children, describing them by reference to the father, would be altogether invalid." See further, *Gardner v. Heyer*, 2 Paige 11.]

1822,—*Angell v. Angell*.

Charity and Friendly Societies," it is provided, that the provisions and remedies of these two acts should extend "to all cases of petitions [\*83] on which courts of equity are by law authorized and empowered to make summary orders without suit, in matters of charity, or in matters of benefit or friendly societies.

The vice chancellor considered, that the true intention of the last act must have been to enable the court to make such orders upon petition in matters of charity and friendly societies, though there was some obscurity in the expression.

Order made as prayed for in the petition.[1]

ANGELL v. ANGELL.

1822, 13th, 20th, and 26th November.—*Pleading*.

A demurrer will hold to a bill to perpetuate testimony, if it do not state that no action can be immediately brought.

A bill for a commission to examine witnesses abroad, must allege that an action has been brought.

*Prima facie*, discovery is incidental to relief.

Objections to the jurisdiction of courts of equity to perpetuate testimony.

Cases in which this jurisdiction is exercised.

THIS case was heard on demurrer to the bill, which prayed for a commission to examine witnesses abroad, and to perpetuate their testimony.

The bill stated, that John Angell, by his will, dated 21 September 1774, executed so as to pass freehold estates; gave and devised to the heirs male if any such there were, of William Angell, the first purchaser, at Crowhurst and father of his great grandfather, John Angell, Esquire, and their male heirs for ever, all his lands and estates, both real and personal, in Surrey, Kent and Sussex, nevertheless, subject and liable to such conditions as should be thereafter mentioned, and should not be otherwise disposed of and given; and if there should be no male heirs or descendants of the same William, or the first Angell, of Northamptonshire, in order as they should be found or made \*apparent; and if there should be none of those in being, or that should be apparent, and plainly and legally make themselves out to [\*84] be Angells, and so related and descended, he then gave all his estates whatsoever, both real and personal, to William Browne, Esquire, grandson to Mrs. Frances, the wife of Benedict Browne, Esquire, who was an Angell, and his male heirs for ever.

The bill then stated, that there were many persons resident in England of the name of Angell, and that several of them had endeavored to establish a

[1] As to relief on petition, vide ante, *Marriott v. White and others*, p. 17 and note, *ibid*.

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claim under the devise to the heirs male, of William Angell, the first purchaser, at Crowhurst, or to the male heirs of the first Angell, of Northamptonshire, but that all of them had failed to produce satisfactory evidence in support of their claim; and that in fact, there were no male heirs now in existence of the body of the said William Angell, the first purchaser at Crowhurst, but the plaintiff was the male heir of William Angell, of Crowhurst, by collateral descent, in manner thereafter mentioned. The bill then traced the descent of the plaintiff from the only brother of William Angell, the first purchaser at Crowhurst.

It also stated, that, sometime after the death of the testator, a person of the name of Benedict Browne entered upon the estates, and took possession of them, assuming to be entitled under the devise to William Browne and his male heirs; and that this person, in order to strengthen his pretended title, had taken upon himself the additional surname of Angell, and exercised various acts of ownership, by selling and letting divers parts of the real estates; and that a part of the real estates of considerable value was now in [\*85] the possession of this person, as the ostensible owner and proprietor hereof, or of his under tenants; but that the plaintiff had as yet been unable to trace, with any certainty, who were in possession of other parts of the estates, so as to name them as defendants to this bill.

The bill stated also, that the plaintiff had, ever since the testator's death, resided in America, until within the two last years, during which time he had twice come over to England, in order to investigate his right, and assert his claim to the estates in question; and that it was not till within these two years that he had been made acquainted with the provisions of the will of John Angell, or with the fact, that he was the heir male of William Angell the first purchaser at Crowhurst.

It then stated, that the plaintiff was about to commence an action at law to recover possession of the estates, of which the defendant was so in possession; and that in such action it would be necessary for him to prove, amongst other things, the several facts before mentioned, relating to his descent; and that the same could be proved by divers other persons now resident in America, and out of the jurisdiction of the court, but that such persons were very aged, and likely to die before the plaintiff could bring his action to trial, and that he would lose the benefit of their testimony at such trial, unless their evidence was perpetuated in this court.

The bill prayed, that the plaintiff might be at liberty to examine his witnesses, and that their testimony might be preserved and perpetuated; and [\*68] that a commission might be granted for the examination of his witnesses in the United States of America, and other parts beyond the seas, and for general relief.

To this bill the defendant demurred, on two grounds: First, for want of equity generally: Secondly, because the plaintiff had not annexed to his bill an affidavit of any of the circumstances, by means of which the testimony of the

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witnesses, whom he prayed he might examine in order to perpetuate their evidence, was in danger of being lost. (a)

The court called upon Mr. *Pemberton*, the counsel for the plaintiff, to produce some authority in support of such a bill as this, which sought to perpetuate the testimony of witnesses where no action at law had been brought, and nothing was averred in the bill to show that an action could not be brought immediately. No such authority could be produced at this time, and the case was therefore allowed to stand over for a week.

Mr. *Pemberton*, for the bill.

This bill prays for a commission to examine witnesses abroad, and is in fact a bill for a commission, and for a discovery. It must be considered to be a bill for discovery, because it contains interrogatories as to how the defendant is entitled to the lands in question. It is clear from the authorities, that a bill for discovery will lie before an action at law is brought. There has indeed been a difference in the practice on this point; but the latest authorities are in favor of the doctrine, that there may be a bill for discovery before an action is brought. This could not be considered as a bill for relief, [\*87] merely because it prays for a commission to examine witnesses. *Moodalay v. Morton*. (b) is an express decision, that a demurrer will not hold to a bill for a commission to examine witnesses, because no action has been brought. *Mendes v. Barnard* (c) is another authority to the same effect; and another case, *Emmot v. Aylet*, is mentioned by Sir Lloyd Kenyon, in his judgment in *Moodalay v. Morton*. It is said by Lord Eldon, in *The City of London v. Levy*, (d) that "where the bill avers that an action is brought, or where the necessary effect in law of the case stated by the bill, appears to be, that the plaintiff has a right to bring an action, he has a right to a discovery to aid that action so alleged to be brought, or which he appears to have a right and intention to bring." The same reasoning which applies to the case of a bill for discovery, must apply also to a bill for a commission to examine witnesses, because they are bills of the same nature; and in both cases the costs must be paid by the plaintiff. (e) It might be said, that, if the bill for a commission was brought before action, the plaintiff might never bring his action, but the same thing might be said of a bill for discovery. The demurrer, even if good as to the other parts of this bill, does not extend to the discovery which is sought by it.

Mr. *Bell*, and Mr. *Ellison*, for the demurrer, relied on the general rule, that a bill of this nature could not be sustained before action; and contended that *Moodalay v. Morton*, and the other cases cited, were cases of exception on account of particular circumstances; and they cited the case of *Pitt v. Short*, before Lord Eldon, Trin. 1810, in which it was decided, that a [\*88] demurrer would hold to a bill for a commission to examine witnesses, in

(a) See *Miff.* 41. & 42.

(c) 1 *Dick.* 85.

(b) 2 *Dick.* 652; 1 *Bra. C. C.* 153.

(d) 8 *Ves.* 404.

(e) *Miff.* 130



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aid of an action, if the bill did not state that an action had actually been brought. (f) As to the demurrer for want of an affidavit, it was laid down expressly by Lord Redesdale, (g) that the want of an affidavit to a bill of this kind is good cause of demurrer. This was plainly a bill for relief, and not a mere bill for discovery.

The VICE-CHANCELLOR:—When this case was opened, it appeared to me that there were other objections to the bill than those which had been suggested, and which might be taken advantage of under the general demurrer; namely, that, if considered as a bill to perpetuate testimony, it was defective, because it did not allege that the matter in question could not be made the subject of an immediate action: and that if it could be considered as a bill to examine witnesses abroad in aid of an action at law, it was defective, because it did not allege that an action was then pending. And I directed the case to stand over for a week, in order to have those points considered.

Upon the second argument, the counsel for the plaintiff produced the case of *Moodalay v. Morton*, as an authority for the proposition, that this court would entertain a bill for a commission to examine witnesses abroad in aid of a trial at law, although no action at law was then pending.

[\*89] \*The jurisdiction which courts of equity exercise to perpetuate testimony, is open to great objections: first, it leads to a trial on written depositions, which is much less favorable to the cause of truth than the *viva voce* examination of witnesses. But what is still more important, inasmuch as those written depositions can never be used until after the death of the witnesses and are not indeed published till after the death of the witnesses, it follows whatever perjury may have been committed in those depositions it must necessarily go unpunished. And this testimony has, therefore, this infirmity, that it is not given under the sanction of the penalties which the general policy of the law imposes upon the crime of perjury. It is, for these reasons, that courts of equity do not entertain bills to perpetuate testimony generally for the purpose of being used upon future occasion, unless where it is absolutely necessary to prevent a failure of justice.

If it be possible that the matter in question can, by the party who files the bill, be made the subject of immediate judicial investigation, no such suit is entertained. But if the party who files the bill can, by no means, bring the matter in question into present judicial investigation (which may happen, when his title is in remainder, or when he is himself in possession) these courts of equity will entertain such a suit: for, otherwise, the only testimony which could support the plaintiff's title, might be lost by the deaths of his witnesses. Where he is himself in possession, the adverse party might purposely delay his claim with a view to that event. It is therefore, ground of demurrer to a bill to perpetuate testimony, generally, that it is not al-

(f) This case is not reported, but was cited from a MS. note of Mr. Newland's.

(g) *Mitt.* 41 & 121.

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leged by the plaintiff that the matter in question cannot be made \*by [\*90] him the subject of present judicial investigation. But courts of equity do not merely entertain a jurisdiction to take or preserve testimony, generally, to be used on a future occasion, where no present action can be brought, but also, to take and preserve testimony, in special cases, in aid of a trial at law, where the subject admits of present investigation. At law, no commission to examine witnesses who are abroad, for the purpose of being used at the trial, can go without the consent of the adverse party.[1] Courts of equity will, upon a bill filed, grant such commission without the consent of the adverse party.[2] So courts of equity will entertain a bill to preserve the testimony of aged and infirm witnesses to be used at the trial at law, if they are likely to die before the time of trial can arrive: and will even entertain such a bill to preserve the testimony of a witness who is neither aged nor infirm, if he happen to be the single witness to support the case.

I have already observed, that the case of *Moodalay v. Morton* has been cited on the present occasion as an authority that courts of equity will entertain a bill for a commission to examine witnesses abroad in aid of a trial at law, where a present action may be brought, and is not brought. When that case comes to be accurately examined, it will be found not to sustain, nor even to favor, such a general proposition. The object of the bill there, was to discover, by the examination of witnesses in the East Indies, whether the persons who had done the act complained of, had or not the authority of the *East India Company*, for the purpose of determining whether redress was to be sought against the *East India Company*, or the person who has done the act individually. The cases cited principally apply to this view of the case; and the learned \*judge proceeds upon it. If a bill will [\*91] or the purpose of ascertaining facts upon which it must depend against whom the action is to be brought, such a bill must necessarily precede the action; and this case being a case of specialty and exception, rather disproves than affirms the general propositions for which it was cited.

If a bill for a commission to examine witnesses abroad to be used on a trial at law, were entertained before any action actually commenced, then, inasmuch as it is not pretended that there is any time limited within which the future action is to be brought, this consequence might follow; that the plaintiff in the bill, having obtained this written testimony, not given under the sanction of the penalties of perjury, might delay his action until after the deaths of those

[1] Courts of record in New York, are authorized by 2 R. S. 393. § 11, to issue commissions to take the testimony of witnesses resident without the state. This is not, however the introduction of any new practice, as it existed by statutory regulations long preceding, and probably a similar provision in all the other states. The R. S. of New York, however, go further by allowing a plaintiff to obtain a commission, after interlocutory judgment, and thus enables him to support his case, on the execution of a writ of inquiry.

[2] 2 R. S. 398, which in certain specified cases obviates the necessity of filing a bill; but it does not oust the chancery jurisdiction.

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witnesses for the adverse party resident in this country and subject to *viva voce* examination, whose evidence might be in opposition to this written testimony; and thus the justice of the case might be defeated. On the other hand, no reason of justice, or even of convenience to the party plaintiff in such a bill, requires that he should be permitted to file it before he has actually commenced his action. The necessary effect of such a bill is, to suspend the trial until the commission is returned, and to secure to him the benefit of his foreign evidence; and all further delay of trial is injustice to the other party.

I am therefore of opinion, both upon authority and upon principle, that a bill for a commission to examine witnesses abroad in aid of a trial at law, where a present action may be brought, is demurrable to, if it do not aver that an action is pending.

[\*92] \*The present bill alleges, that the witnesses in America whom the plaintiff purposes to examine in support of the action, which he avers he intends to bring, are aged and infirm, and likely to die before the plaintiff may be able to bring the said intended action to a trial.[1] I have stated, that courts of equity will entertain bills to preserve the testimony of such witnesses, in order to prevent the failure of justice by their death before trial, even where the subject admits of present judicial investigation. In the case of *Phillips v. Carew*, (h) it seems to have been held by the master of the rolls, and also by the lord chancellor upon a re-hearing, that such a bill would lie before an action actually commenced, provided the plaintiff annexed to his bill and affidavit of the truth of his alleged statement with respect to the witnesses. If that case be to be followed as an authority, it would not assist the present plaintiff, for he has annexed no such affidavit to his bill; and the want of the affidavit is assigned here as a special cause of demurrer.

The principle of that case (supposing it to be correctly reported,) is not, however, very satisfactory. Written depositions, on account of the infirmity which I have before referred to, are never to be received where with reasonable diligence, *viva voce* testimony may be had, and the circumstance that the witnesses are aged and infirm, should be rather a reason for the action being immediately brought, to give the better chance of their living till the trial, than a reason for permitting the action to be indefinitely delayed at  
[\*93] the pleasure of the plaintiff. Whenever such a case \*occurs again, the principle of *Phillips v. Carew*, will come to be re considered.(i)

(h) 1 P. W. 117.

(i) See as to bills to perpetuate testimony, and for commissions to examine witnesses abroad, the following cases: *Duke of Dorset v. Girdler*, Pr. Ch. 531; *Pawlett v. Ingray*, 1 Vern. 308; *Gill v. Hayward*, 1 Vern. 312; *Bechinall v. Arnold*, 1 Vern. 354; *Parry v. Rogers*, 1 Vern. 441; *Morse v. Buckworth*, 2 Vern. 440; *Wynne v. Hally*, Pro. Cha. 531; *Cressett v. Milton*, 3 Bro. 481; *Shirley v. Ferrars*, 3 P. W. 77; *Brandlyn v. Ord*, 1 Atk. 471; *Earl of Suffolk v. Green*, 1 Atk. 450; and *Lord Dursley v. Fitzharding*, 6 Ves. 251; in which last case the various authorities were fully discussed. [Vide etiam, Story's Eq. Plead. 243, 252. A bill to perpetuate testimony is never brought to a hearing: *Vaughan v. Fitzgerald*, 1 Sch. & Lef. 315.]

(1) Vide *Conklin v. Hart*, 1 Johns. Cas. 103.

1822.—Verlander v. Codd.

On the part of the plaintiff, it is however argued, that if the demurrer could otherwise be supported, it must fail, because it extends to the discovery as well as to the relief, and that if the plaintiff be not entitled for the reason stated, to perpetuate testimony, or to examine his witnesses abroad, yet still he is entitled to a discovery.

I am not of that opinion. *Prima facie*, it must be intended that the discovery is incidental to the relief. This plaintiff might perhaps have used expressions, which would have made the discovery a substantive part of his case. It is sufficient to say, that he has used no such expressions in this bill; and that the discovery is only sought for by the common form of interrogatory.

Demurrer allowed.

\*VERLANDER V. CODD.

[\*94]

1822, 28th November.—*Practice. Misnomer.*

If, in the title of an order to dismiss a bill for want of prosecution, the plaintiff is called by a wrong christian name, a replication filed after the order is drawn up and served, will not be taken off the file.

On the 27th of July last, the defendant obtained an order to dismiss the bill in this cause for want of prosecution.

The plaintiff's name was Jacob Alexander Verlander; but, in the title of the order, he was called, by mistake, Daniel Verlander. The order, so drawn up, was duly served upon the plaintiff's clerk in court on the 22d day of August last.

On the 29th of October last, the plaintiff filed a replication.

Mr. Bligh, for the defendant, moved to take the replication off the file, for irregularity. He contended that no service of the order was necessary, but that it operated from the time it was pronounced; and he cited *Lorimer v. Lorimer*. (a)

The VICE-CHANCELLOR:—What is decided in *Lorimer v. Lorimer* is, that when you draw up the order, it acts retrospectively from the time it was made. The bill is not out of court until you draw up the order; and, when it is drawn up, it acts retrospectively from the time it was made. This is an order dismissing the bill of Daniel Verlander; whereas there is no such cause in court.

Motion refused. [1]

(a) 1 Jac. & Walk. 284.

[1] This case was affirmed on appeal to the Lord Chancellor, 1 Turner 95.

1822 — Wake v. Franklin.

[\*95]

\*WAKE v. FRANKLIN.

1822, 28th November.—*Practice. Return of commission.*

Commissions for the examination of witnesses abroad, returnable without delay, need not be returnable within the same period as home commissions, viz. before the end of the term next after they are issued; but a reasonable time is allowed, according to circumstances.

THIS suit was instituted for a discovery and for a commission to examine witnesses abroad, in aid of an action at law.

A commission dated the 24th of August 1821, was accordingly issued for the examination of witnesses at Hamburgh, and was made returnable without delay: but it appeared that it was not executed until after the end of Michaelmas term 1821.

Mr. Wray moved, on a former day, that the depositions taken by virtue of this commission might be suppressed, on the ground that the commission being dated in August 1821, and made returnable without delay, ought, according to the practice of the court, to have been returned on or before the last day of Michaelmas term 1821. *Barnsley v. Powell.*(a)

It was admitted by the other side, that this would have been the case, if the commission had been a home commission; but it was contended, that the same rule did not apply where the commission was a foreign one. The Vice-Chancellor, ordered the motion to stand over that the practice might be inquired into.

It was found, upon inquiry, that there was no settled rule as to the time at which a foreign commission, returnable without delay, ought to be returned.

Mr. Wray, this day, repeated his motion, and said, that it was clear, in all cases where a commission issued for the examination of witnesses in [\*96] England, returnable \*without delay, that it must be returned before the end of the next term; but that he was not able to find any cases as to a commission to be executed abroad: that it was proper for the party to apply, that the commission might be returned in a reasonable time; but that, if it was made returnable without delay, it must have the same construction as a commission to be executed in England: and that, as it appeared that this commission was executed after the time when it ought to have been returned, the power of the commissioners was determined; and the depositions taken by them ought, therefore, to be suppressed.

Mr. Rose, contra:—It was found that there was no rule governing the practice as to the return of commissions to be executed abroad, returnable without delay. The words "without delay" give any reasonable time. Here we have an affidavit stating, that some of the witnesses resided in Norway; that the ship, on board of which the commission and depositions were put for the purpose of being convey to England, was wrecked on the coast of Jutland: that the captain, to whose care they were entrusted, was detained there several

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1822.—*Sayers v. Walond and others.*

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months, in order to re-ship to this country such part of the cargo as had been saved from the wreck: and that, immediately on his arrival in London, he delivered the commission and depositions to the plaintiff's clerk in court.

Here the commission issued in the vacation; and it would have been impossible to have returned it in the next term.

The VICE-CHANCELLOR:—I think it is the habit of this court to issue commissions returnable either on a day certain, or without delay. \*In [\*97] practice, however, it is found convenient to limit the time for the return of commissions returnable without delay. The general rule is, that such commissions must be returned before the third return of the following term. But this court does not appear to have fixed any certain time within which commissions to be executed in a foreign country are to be returnable. I am bound, therefore, until a rule is furnished by practice, to inquire whether there has been unreasonable delay. Now it appears, from the statement of Mr. Rose, that there has not been unreasonable delay: and I must, therefore, refuse this motion. It is impossible to fix any certain time for the return of all commissions to be executed abroad, on account of the different distances of the places at which they are to be executed. But it would be a good rule to fix a period for the return of every foreign commission, calculated on the distance of the place at which it is to be executed.

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*SAYERS v. WALOND and others.*

1822, 28th November.

The court has no jurisdiction to order a solicitor's bill to be taxed, on the application of the solicitor himself.

This suit was compromised; and the defendants having afterwards changed their solicitor, their present solicitor undertook to pay the former his bill of costs, upon its being taxed in the usual manner.

A motion was accordingly made by Mr. *Newland*, on the 7th of November, on the part of the late solicitor, that the bill might be referred to the master for taxation; and he cited Harr. Ch. P. 360, *Newland's* edition.

The Vice-Chancellor having expressed doubts as to \*his power to [\*98] make such an order, upon the application of the solicitor, ordered the motion to stand over, that Mr. *Newland* might search for authorities. The motion was mentioned again on the 8th of November, but the vice-chancellor still doubted as to his power of making the order, and desired that the motion might be mentioned again.

Mr. *Newland*, this day, renewed his application; and stated, that he had not been able to find any authority, or any decision, except the passage he had cited from Harr. Ch. P.

The VICE-CHANCELLOR:—I cannot make any order. The opinion of the re-  
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 1822.—Keane v. Price.
 

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gister is, that no such order has ever been made. Taxation is for the benefit of the client. The solicitor has a right to bring an action, complying with the requisites of the statute. (a)

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KEANE v. PRICE.

1822, 5th December.

The examination of a sequestrator in the master's office, does not require the signature of counsel.

On the 1st of November, Mr. Agar moved, on the part of the defendant, Mr. A. Riley, that the answer and examination of J. Bowyer and T. Charlton, sequestrators, in this cause, sworn the 5th day of August 1822, to interrogatories exhibited by the defendant, Mr. A. Riley, for their examination before the master, might be suppressed for irregularity, because it was not signed by counsel.

Mr. Parker opposed the motion, and contended, that the signature of [\*99] counsel was not necessary to the examination of these persons, as they were sequestrators, and not parties to the cause.

The Vice-Chancellor, ordered the motion to stand over till the first day of term, in order that the practice might be inquired into.

On the first day of term, Mr. Agar renewed the motion, and mentioned several cases which had been found, upon inquiry in the master's offices, in which the examinations of receivers and sequestrators were signed by counsel; but he admitted, that there were some instances in which such examinations were not signed.

Mr. Parker said, that he had looked through all the orders, and that there was not one that required such an examination to be signed by counsel; and he cited *Bonus v. Flack*. (b)

The Vice-Chancellor having directed the motion to stand over till this day, now ruled, that the signature of counsel was not necessary in this case; and added, that, though the policy of the court made it necessary that plaintiffs and defendants should employ counsel to sign the pleadings, that rule had never been extended to officers of the court, not parties to the suit, or to other persons, not parties, incidentally brought before the court.

Motion refused.

(a) 2 Geo. 2 c. 23. See Beames on Costs, in Eq. 292, 293.

(b) 18 Ves. 287.

1822.—*Barlee v. Barlee and others.*

\**BARLEE V. BARLEE and others.*

[\*100]

1822, 28th November.—*Feme Covert. Prochein Amy.*

A married woman being the plaintiff, and her *prochein amy* having died, it was ordered, that she should name a new *prochein amy* within two months, or that the bill should be dismissed, and the costs paid out of the fund in court.

The separate property of a married woman, in the hands of the court, is liable to the costs of a suit instituted by her touching that property.

THE bill in this case was filed by a married woman, suing by her next friend, against her husband, and the trustees of her marriage settlement, for an account of the rents of certain lands which had been settled to her separate use.

A sum of money, which had arisen from the rents, had, in the course of the cause, been paid into court.

The next friend having died, Mr. *Cooper* moved, that the plaintiff might be ordered to appoint a new next friend within a month, or that the bill might be dismissed, with costs, to be taxed and paid out of the fund in court.

Mr. *Beames*, for the plaintiff, said, that the proper course was, to move that a new next friend might be appointed; and that the second part of the motion was quite irregular.

The Vice-Chancellor ordered, that the bill should be dismissed, unless a new next friend were named within two months; that the costs of the trustees should be taxed as between solicitor and client, and paid out of the fund in court; and that the residue of that fund should be paid over to the plaintiff. (a) The husband did not ask for his costs.

\**DAVENPORT V. DAVENPORT.*

[\*101]

1822, 28th November.—*Prochein Amy.*

Where a new next friend is to be substituted, the court refused to inquire into the circumstances of the proposed next friend, though it was suggested, that he was in indigent circumstances.

In this case the plaintiff was an infant suing by his next friend.

Mr. *Fisher*, on behalf of the plaintiff, moved, that a new next friend might be substituted, on an affidavit, that the present *prochein amy* was a material witness for the infant, and must be examined in the cause.

Mr. *Bell*, on the part of the defendant, required, that the *prochein amy*, who was retiring, should give security for the costs already incurred; and stated, that the person who it was proposed to appoint as the new next friend, was in indigent circumstances. He, therefore asked, that it might be referred to the master, to inquire whether the proposed next friend was a proper person to act in that capacity, with a view to his circumstances.

(a) See *Roundell v. Currey*, 6 Ves. jun. 250; and as to the appointment of a new *prochein amy* on the death of the first, see *Bracey v. Sandiford*, 3 Madd. 468. [See next case, and note, *ibid.*]



1822.—*Whitehouse v. Hickman.*

The Vice-Chancellor ordered the proposed next friend to be substituted in the room of the present one, on the latter giving security to the defendant for the costs already incurred. And his honor refused to enter into any inquiry as to the circumstances of the proposed next friend, who, he said, would be at liberty to file a new bill without such inquiry. (a)

[\*102]

\*WHITEHOUSE v. HICKMAN.

1822, 9th December.

To prevent either an attachment, or an injunction, or a motion to extend the common injunction to stay trial, the answer must be filed on the evening before the seal day at the latest.

An answer filed on the seal day is too late to prevent a motion to extend the common injunction, although the motion, on account of the pressure of business, was not made until the following day.

The Vice-Chancellor has no jurisdiction under the act 53 Geo. 3, c. 24, to alter, vary or discharge any order made by the master of the rolls.

Plaintiff having obtained an order to amend and that defendant may answer exceptions and amendments at the same time, the defendant may immediately move that the amendments be made within ten days, or the order be discharged.

THE common injunction having been obtained in this cause, Mr. *Wakefield*, on the 6th of December, moved to extend it to stay trial, upon the usual affidavit.

The seal day was on the 5th of December, and notice of the motion was given for that day; but, there not being sufficient time for all the motions to be made, they were continued on the day following.

Mr. *Beames*, for the defendant, said, that the answer had been filed on the 5th of December; and he cited *Bishton v. Birch*. (b)

Mr. *Wakefield*, replied, that the answer having been filed on the seal day, was filed too late to prevent the motion being granted; and he cited *Nelthorpe v. Law*. (c)

The Vice-Chancellor thought, that, according to the practice of the court, this answer has been filed too late, and referred to the register.

(a) See *Watts v. Campbell*, 12 Ves. 493. It is said in the Prae. Reg. edit. Wyatt. 349, that where a suit was by *prochein amy* not sufficient to answer the costs, the court ordered that another should be named. In other books it is stated that the *prochein amy* must be a responsible person. Milt. 21. Stra. 708; and see *Anon.* 1 Atk. 570, where it is said that a *prochein amy* need not be a relation, but must be a person of substance, on account of costs. [Vide, post, 188, note. *Pennington v. Aikin*, 264. Where a bill has been filed on behalf of infants, under circumstances raising a strong suspicion against the motives of the next friend, the chancellor (Lord Brougham,) directed a reference to a master to inquire whether the suit were for the benefit of the infants, and if it be; as to the proper persons to conduct it in case the present next friend be removed, "but the master must inquire whether or not H. B. (the present next friend) is a fit and proper person to be continued the next friend." *Mulder v. Hawkins*, 2 Mylne & Keene, 243. S. C. Coop. 175. It may be well inferred from the language of the lord chancellor, that he considered that suit were too often commenced, nominally, for the benefit of an infant, when in reality they are designed for individual advantage.]

(b) 2 V. &amp; B. 40.

(c) 13 Ves. jun. 388.

1822.—*Whitehouse v. Hickman.*

The register said, that he thought there was a decision by the Lord Chancellor to the contrary. His Honor therefore requested the register to mention the subject to the Lord Chancellor.

The Vice-Chancellor this day said, that the question had been mentioned to the Lord Chancellor, and that his lordship was of opinion that an answer, for the purposed of being good cause against the granting of \*such a motion as the present or of a motion for an attachment and [\*103] injunction, must be filed at the latest by eight o'clock on the evening before the seal day(c.)

\*Exceptions were afterwards taken to the defendant's answer, and [\*104] some of them were allowed by the master. (d)

(c) The principle of the court seems to be, that as the order for an injunction, or to extend an injunction, or for an attachment, is to be considered as made at the very earliest moment of the seal day, the answer, in order to be used as an objection to the issuing of these orders, must be filed on the preceding day. *Bruce v. Webb*, 2 Meriv. 474. That rule is confirmed by the following case:—

*ISSOTTS V. BOOTH.*

1823, 5th February.—A mistake as to the office hours, (even where the answer was sworn the day before, and was filed at the earliest possible moment on the seal day) is no ground of exception to the general rule, that, in order to prevent an attachment, or an injunction, the answer must be filed the day before the seal day.

The bill prayed for an injunction to restrain proceedings at law.

The defendant's time to answer expired on the 31st January 1823.—Early on the morning of that day, his solicitor sent his clerk to the six clerk's office to inquire what was the latest hour at which the office would be open and was informed by one of the officers, that the hours for business were from ten till two, and from six till eight in the evening; but was not told that the 31st January was a half-holiday, and that the office would therefore be closed on the afternoon of that day. In consequence of his information, the solicitor made arrangements to have the answer sworn within the usual office hours that evening. Before three o'clock, he discovered the mistake, but was informed at the six clerks' office, by the person who acted as agent both for his clerk in court and for the clerk in court of the plaintiff, that he might get the answer sworn that evening at the public office in Southampton buildings, and that he (the agent) would call for it early the next morning, and put it on the file as soon as the six clerk's office was open, which, he assured the solicitor, would have the same effect as if the answer had been filed that evening and would prevent the injunction.

The answer was accordingly sworn at the public office, and was taken from thence by the agent very early on the following morning, and put upon the file. The plaintiff, however, obtained an attachment and the common injunction, for want of the answer. A motion was this day made, on behalf of the plaintiff, that the order for the common injunction and the attachment might be discharged, and that the answer, under the circumstances, might be considered as filed on the 31st of January. The motion was supported by an affidavit of the facts already mentioned.

*Mr. Bell* and *Mr. Knight* for the motion, relied on the particular circumstances of the case, as making it an exception to the general rule. The mistake as to the office hours was induced by what passed with the person who acted as agent for both parties.

*Mr. Duckworth*, for the plaintiff, said, that the person who had acted as mutual agent, denied that he had used such expressions as were imputed to him in the affidavit for the defendant, *Bruce v. Webb*, 2 Meriv. 474. has settled the strict rule, that, where the attachment issues on the same day on which the answer is filed, the former has the priority, without regard to hours.

The Vice-Chancellor refused the motion, with costs. [See further *Thompson v. Byrom*, 3 Beav. 15.]

(d) What follows of this case is given *ex relatione*, *Mr. Beames*.

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1822.—Court v. Jeffery and others.

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On the 16th December, the plaintiff, by petition to the master of the rolls obtained the common order, that he might be at liberty to amend his bill, and that the defendant might answer the exceptions and amendments at the same time. On the same day, the defendant gave notice of a motion to be made on the 18th of December, before the Vice-Chancellor, that the plaintiff might amend within ten days, or otherwise, that the order made by the master of the rolls might be discharged.

Mr. *Beames* now moved, pursuant to this notice, but suggested a doubt whether, under the act of parliament 53 Geo. 3, c. 24, the Vice-Chancellor was authorized to discharge any order made at the rolls.

Mr. *Wakefield*, for the plaintiff.

The Vice-Chancellor, in consequence of the doubt suggested as to the jurisdiction, requested that the motion might be made before the Lord Chancellor.

[\*105] \*The motion was accordingly made before the Lord Chancellor, and the doubt which had occurred as to the jurisdiction was mentioned. His lordship held, that the act of parliament gave no authority to the Vice-Chancellor to alter, vary, or discharge, any order made by the master of the rolls; but his lordship made the order, holding, that such a motion may be made immediately after the order to amend is obtained, and before the plaintiff is in delay. The plaintiff's counsel asking for longer time to amend than ten days, an order was made, that he should amend before the next seal.

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#### COURT V. JEFFERY and others.

1822, 26th November.—*Parties.*

The general rule is, that appointees under the will of a feme covert, are necessary parties to a suit, concerning the fund which is the subject of appointment. (a)

THE plaintiff, by his bill, prayed that the defendants might be decreed to pay over to him the sum of 550*l.* and interest, as to which a testamentary appointment, in favor of various persons, had been executed by Mrs. Alice Short, a feme covert, by virtue of a power reserved to her in her marriage settlement. The appointees were not made parties to the suit. The plaintiff was administrator with the will annexed; and prayed for an account of this sum in his capacity of personal representative of Mrs. Short. The defendants were the trustees of the money under the settlement by which the power of appointment was created.

The cause now came on to be heard.

Mr. *Bell*, and Mr. *Beames*, for the defendants, objected that the appointees were not made parties.

[\*106] \*Mr. *G. Wilson*, for the plaintiff, said the objection was not stated

(a) See the next case as to an exception to this rule.

1822.—*Manning v. Thesiger and others.*

in the answer, and that it now came too late, because the defendants, in their answer, submitted to account.

**THE VICE-CHANCELLOR** :—In ordinary cases the executor represents the whole personal estate, and no legatee need be a party. [1] The personal estate may be exhausted by the debts, and the interest of the legatee is therefore uncertain. But the appointees under the will of a feme covert are in a different situation; their interest cannot be defeated by debts; and they are in the common situation of *cestuis que trust*, and must be made parties. [2]

The cause was ordered to stand over, with leave to the plaintiff to amend. The defendants did not get their costs, because the objection was not taken by the answer. [3]

**MANNING v. THESIGER and others.**

1822, 12th December.—*Parties.*

Where appointees are very numerous, and the bill is filed by some of them, on behalf of themselves, and the others, the court will dispense with the general rule, which requires all appointees to be parties.

THE plaintiffs sued on behalf of themselves and the other legatees and appointees under the will of Mary Welsford, a married woman deceased; and the bill prayed, that the fund, which was the subject of the appointment, might be transferred into the name of the accountant-general, on the ground that Thesiger, one of the trustees of the fund, was desirous to be discharged; but refused to transfer the fund into the name of a new trustee without the authority of the \*court, alleging that the appointees differed among them- [\*107] selves as to the choice of a person to be appointed trustee in his room.

Mr. Keene, for the plaintiffs, moved that Thesiger be ordered to transfer the fund into the name of the accountant-general, in trust in the cause.

Mr. Garratt, for the defendants, objected that all the appointees of Mrs. Welsford were not parties to the suit.

Mr. Keene replied, that the appointees were more than fifty in number, and that it would therefore be very inconvenient to bring them all before the court; and that the bill was filed by the plaintiffs on behalf of themselves and the other appointees.

The Vice-Chancellor said, that, as the appointees were *cestuis que trust*, they ought regularly to be all made parties to the suit; but that, as they were very numerous, and as the bill was filed by the plaintiffs on behalf of them-

[1] Vide *Wheeler v. Blackley*, 1 Johns. Ch. Rep. 438.

[2] For the American cases on the subject of joinder of parties, see Amer. Ch. Digest, Pleading, 581, XVIII. Story Eq. Pl. 187. The question involved in the above case was examined by Wallworth, Ch. in *Fisk v. Howland*, 1 Paige, 20. See next case.

[3] Vide *Van Epps v. Van Dusen*, 4 Paige, 54.

1822.—Dew v. Clarke.

selves and the other appointees, the rule might in this case be dispensed with.(a)

[\*108]

\*DEW v. CLARKE.

1822, 20th November; 10th, 11th, and 17th December.—*Multifariousness. Costs.*

Two distinct matters cannot be joined in the same suit, where one requires that the depositions should not be published till the hearing of the cause, and the other requires an immediate publication of the same depositions.

On demurrer allowed to a bill for a commission to examine witnesses, *de bene esse*, the plaintiff having, on an *ex parte* application, obtained an order to examine the witnesses, was ordered to pay to defendants, besides the usual costs of the demurrer, the cost of the depositions; but not of those taken on cross-examination.

THIS case was heard on demurrer.

The bill was by Dew and his wife, who claimed in her right as heiress at law and only next of kin, against the devisees and personal representatives of her father, Eli Stott; impeaching a will obtained by the defendants, on the ground of incapacity in the testator.

Eli Stott, the testator, at the time when the will in question was made, was seised in fee simple of certain real estates, subject to a lease granted by him for a term of years, which would expire in the year 1826. The validity of this lease was not questioned. The will, which was made in May 1818, contained a devise of all the testator's real and personal estate to the defendants, Fletcher, Reid and Rawlings, upon certain trusts; and appointed them, together with the defendant, Mary Stott, to be the executors. The executors renounced probate of the will, and the prerogative court granted letters of administration, with the will annexed, to two persons of the name of Clarke, who were named in the will as residuary legatees, and were also made defendants in this cause.

The bill stated, that if this will was ever executed by Eli Stott, that he was then of unsound mind, and incapable of disposing of his property, and that the executors had renounced probate of the will, because they knew the testator to have been of unsound mind at the time when the will was made, and because they were unwilling to make oath that they believed this will to be the last will of Eli Stott.

(a) In *Croker v. Perrott*, 2 Cha. Ca. 228, on a bill, by one of several children, who were appointees of their mother, to set aside the appointment, on account of the unfairness of the distribution; it was held, that all the other children who were appointees, need not be parties, because they might go in before the master. [Creditors and legatees are exceptions to the general rule, that all persons interested in the fund must be made parties. *Brown v. Ricketts*, 3 Johns. Ch. Rep. 553. *Fisk v. Howland*, 1 Paige, 30. Yet the bill must allege that it was filed on behalf of the complainant and all others who might choose to come in under the decree. *Ibid.* See further, *Ross v. Cray*, 2 Paige, 416. *Kettle v. Cray*. *Ibid.*]

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\*After setting forth these facts, the bill went on to state, that the [\*109] plaintiffs had instituted a suit in the prerogative court to recall the letters of administration with the will annexed, granted to the two Clarkes, and to have administration, as in a case of total intestacy, granted to the plaintiff, Mrs. Dew, as the only next of kin. It then stated, that pending this suit in the ecclesiastical court, the personal estate was in danger of being lost and misapplied :—that the executors named in the will claimed to be entitled under it, and that one of them (Fletcher) had actually received the rents of the real estate : that the plaintiff had brought an action at law against the defendant Fletcher, to recover the rent thus received by him, and intended in that action to dispute the validity of the will. The circumstances of the incapacity of the testator were then set forth in the bill at large, after which it stated, that several witnesses, whose evidence would be material to the plaintiffs in the action already commenced, or in any action of ejectment in which the validity of the will might be disputed, were old and infirm, and that before any trial could take place, there was great danger of their dying, or being incapable of attending at the place of trial to give *viva voce* evidence ; so that the plaintiffs would lose the benefit of their evidence and be materially injured, unless these witnesses were examined *de bene esse* ; and that even if the plaintiffs should recover in the action commenced against Fletcher, the other defendants would not be bound by the verdict or judgment in that action ; and that on account of the subsisting lease of the real estate, the plaintiffs had no present means of bringing an ejectment to try the validity of the will against all the defendants, who therefore meant to lie by till after the expiration of the lease, and after the plaintiffs should \*have lost divers of [\*110] the witnesses who could prove the matters aforesaid ; and that the plaintiffs were, therefore, “ advised, that the evidence of the matters aforesaid ought to be perpetuated in this court against the defendant.”

The bill prayed :—1st, That the personal estate might be secured pending the litigation in the ecclesiastical court, and for this purpose that an injunction might be granted against the personal representatives, and a receiver appointed. 2d, “ That the plaintiffs might be at liberty to examine witnesses, touching the validity of the alleged will, and more especially touching the state of the said Eli Stott’s mind and understanding, and the several allegations aforesaid relating thereto, and that the testimony of such witnesses might be perpetuated ; and (3dly,) That the plaintiffs might be permitted to examine *de bene esse*, such of them as were aged or infirm, or were the only witnesses to any particular fact.”

To this bill the defendants put in a general demurrer for want of equity, and for multifariousness.

*Mr. Heald* and *Mr. Pepys* for the demurrer :—

I. This is a bill to perpetuate the testimony of witnesses, and also praying for relief in other matters, as to which publication of the evidence must pass in the course of the cause. It is settled, that a bill which seeks to perpetuate

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testimony, ought not to contain any prayer for relief. *Ross v. Gannell*, (a)  
*Berney v. Eyre*, (b) *Vaughan v. Fitzgerald*, (c) [1]

[\*111] \*II. There is no equity in this case to have the property preserved, pending the suit in the ecclesiastical court, because administration, with the will annexed, has already been granted, and there is thus a legal personal representative. If the right to have letters of administration were still in dispute in the ecclesiastical court, and there was danger of loss or misapplication of the personal estate, in the meantime, for want of a legal personal representative, there might then be some ground for an application to this court. But where the ecclesiastical court has actually appointed an administrator, and the suit pending there is to recall the administration, there is no ground for the interference of the court. (d)

[\*112] \*III. The bill is unquestionably multifarious. Besides seeking to preserve the personal property, pending litigation in the ecclesiastical court,

(a) 3 Atk. 439. (b) 3 Atk. 387. (c) 1 Sobc. and Lef. 317.

(d) The principle on which the court of chancery interferes to preserve personal property, pending a litigation in the ecclesiastical court, is plainly applicable to cases in which the litigation there is to recall probate or administration already granted, as well as to those cases in which no probate or administration has been granted, before the application to the court of chancery. In *Ball v. Oliver*, 2 V. & B. 96, this was expressly decided, though it is not so stated in the marginal abstract of that case. The doctrine is confirmed by the following more recent case in this court.

#### RUTHERFORD v. DOUGLASS.

6th December, 1822.—*Receiver*. This court will appoint a receiver, pending a suit in the ecclesiastical court to recall probate, on a case of strong presumption.

This bill was filed against the executors of Richard Hall, by his sister and sole next of kin. It prayed the usual accounts of the personal estate, and for a receiver and an injunction, pending a suit instituted by the plaintiff in the ecclesiastical court, to recall the probate.

The testator, when on his death-bed, at the time when he was insensible and utterly incapable of disposing of his property, was made to affix his mark to the alleged will by one of the defendants, who caused a pen to be put between the testator's fingers, and guided his hand. The defendants obtained probate of this will on the same day on which the testator was buried.

The bill stated these facts, together with other strong circumstances, as evidence of incapacity in the testator, and of the charge that the probate had been obtained by fraud.

A motion was made for a receiver and an injunction, against the defendant, before answer, on affidavits of the truth of the allegations contained in the bill.

Mr. *Horne* and Mr. *Matthews*, in support of the motion, which was not opposed.

The VICE-CHANCELLOR.—The ordinary application is for a receiver, where the legal administration has not been granted by the ecclesiastical court, and pending the contest for such administration. Here the legal administration has been granted by the ecclesiastical court, but there is a pending contest to recall the probate.

Taking into consideration the evidence respecting the incapacity of this testator—the manner in which the will was obtained—the sort of surprise by which the probate was acquired, and the danger to the property; and grounding myself on the jurisdiction in this court, to protect property pending a litigation in another court, I am of opinion that this is a fit case for a receiver and an injunction.

See also *Atkinson v. Henshaw*, 2 V. & B. 85, and the cases there cited, together with the cases cited in *Ball v. Oliver*, 2 V. & B. 96. [Vide *Watkins v. Brent*, 1 Mylne & Craig, 97]

[1] Vide ante, 93, n.]

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it also prays, that the testimony of witnesses may be perpetuated as to the right to the real estate, and that witnesses may be examined *de bene esse*, in aid of an action already brought to recover rents and profits. The court, if it interferes at all against the legal right of the personal representative, can only do so on a case of strong presumption. Affidavits may be sufficient for the purpose of a motion for a receiver, but the defendant may insist on the cause being brought to a hearing, and then the plaintiff must establish his case by regular evidence in the cause. Regularly, this evidence should not be published till the hearing of the cause; but if used for the purpose of the trial at law, there must, as to such parts of it as are used for that purpose, be an immediate publication. This inconvenience makes it impossible to join in the same suit two distinct matters, one of which requires an immediate publication of the \*testimony, while the other requires publication to be postponed till [\*113] the usual stage.

Mr. Bell, and Mr. Garratt, for the bill :—

As to the *first* point : inasmuch as the outstanding term in the lessees prevents an action of ejectment from being brought till the lease has expired, the bill makes out a good case for perpetuating testimony.

As to the *second* point : the principle on which the court acts, as to the preservation of property pending litigation in the ecclesiastical court, clearly applies to those cases where the litigation takes place for the recall of probate or administration, as fraudulently obtained. *Atkinson v. Henshaw*, (e) and *Ball v. Oliver*. (f)

As to the *third* point : the bill is not multifarious. Where the objection to the will applies equally to the real and the personal estate; and where the same defendants are interested as to both, it is very difficult to show how such a bill can be multifarious. *Mist. 146*. Here there are no distinct matters, as to which relief is sought against several defendants. All that the court will consider in such a case as this, is, whether the plaintiff brings forward his case in such a way, as that the matters in question can be fairly and properly discussed. Even if there were two distinct bills filed by the plaintiff, it is plain that, as the validity of the will must be the main question to be decided in both, it would be necessary to examine the same witnesses in both causes; and in one cause, publication would pass immediately, while in the other cause, the testimony would be locked up for years, till an action of ejectment could be brought. \*It is therefore quite clear, that the inconvenience [\*114] which is complained of, is unavoidably incident to such a case, and cannot be prevented by separate suits.

The VICE CHANCELLOR :—It appears to me, that this bill makes out no case for perpetuating testimony. Although it were true, that the validity of the will could not, by reason of the lease, be immediately tried with the devisees in trust, yet it may be immediately tried by an action for rent against the tenant. Testimony can be perpetuated only where by no means the plaintiff can

(e) 2 V. & B. 84.

(f) 2 V. & B. 96.



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 1822.—Dew v. Clarke.
 

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presently assert his title to the property. I must therefore reject altogether the prayer to perpetuate testimony, and consider the bill as if it were not inserted, and not therefore multifarious on that account.

It has, however, been said for the defendants, that the same objection applies to that part of the bill, which seeks to protect the personal property; that, to induce the court to interfere against the legal title of the executor, it is necessary to establish by evidence, strong presumption against the will; and, although this would be attempted by affidavit for the purpose of obtaining a receiver, yet the defendants may force on the cause to a hearing on that point, and then it would be incumbent on the plaintiff to establish the same presumption against the will by regular testimony; that this testimony ought not to be published, till the cause is ripe for hearing, yet, as far as it is used at law, it would be immediately published; and, therefore, these two purposes are inconsistent, and cannot be joined in the same suit.

[\*115] I yield to this reasoning, and shall allow the demurrer. \*It is extremely true, that if a distinct bill were filed for examining the witnesses in aid of the trial at law, that the immediate publication would give the same information to the parties, as if it were in the same suit. And so too would the *viva voce* examination of witnesses at law. But this is a consequence unavoidable in all cases where the same testimony is to be used at law and in equity. Still the rule must prevail, that you cannot join in one suit two distinct matters, one of which requires that the depositions taken in the cause should not be published until the cause is ripe for hearing, and the other requires a previous publication of the very same depositions, not merely the same testimony.

Demurred allowed. [1]

His honor offered to allow the plaintiffs leave to amend the bill, by confining it merely to the protection of the property pending the litigation; but they did not avail themselves of that offer; and the usual order was made, allowing the demurrer.

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In this same case the bill was filed on the 24th July, 1822.

On the 27th of the same month the plaintiff obtained the usual order, *ex parte*, to examine the old and infirm witnesses *de bene esse*.

On the 30th, a subpoena to answer was served on the defendant.

[\*116] \*On the 4th August following, the order for examination of the witnesses *de bene esse*, was served on the defendants.

On the 16th August, the defendants filed their demurrer.

On the 14th September following, the witnesses were examined *de bene esse*, the defendants joining in the commission, and cross-examining the witnesses.

Before the demurrer was argued, the plaintiffs moved for an order that the clerk in the court might attend at the trial at law, with the deposi-

[1] *Vide ante*, 66, n.

1832.—*Dew v. Clarke.*

tions taken *de bene esse*, for the purpose of having them read where it appeared to the court of law, that the witnesses were unable to attend.(g)

When this motion was made, it was insisted for the defendants, that if the demurrer was allowed, these depositions would fall to the ground, and could there be used in the mean time. The court, therefore, ordered the motion to stand over till after the demurrer was argued.

After the demurrer was allowed (11th December,) the defendants on 17th December (the next day for motions,) moved that the plaintiffs, in addition to the 5*l.* the usual costs on a demurrer, being allowed, might pay the full costs, including the costs of the depositions.

Mr. *Heald*, and Mr. *Pepys*, for the motion, insisted \*on the general [\*117] order by Lord Loughborough, dated 6th February 1794,(h) *Griffith v. Wood*,(i) *Wood v. Dyneley*,(k) and *Pilkington v. Wignall*,(l) cases in which, on the ground of vexatious conduct on the part of the plaintiff, the defendant on having his demurrer allowed, had full costs. The intention of the 5*l.* costs was to indemnify the party; but in the present case, the plaintiff by his *ex parte* application, has produced the depositions, which occasioned very heavy expense in this cause to the defendants.

Mr. *Bell*, and Mr. *Garratt*, for the plaintiffs, objected that this application came too late, as the bill was out of court, by the order allowing the demurrer: and that there was no cause pending before the court in which the order now sought could be pronounced.

The Vice-Chancellor said, if that was any objection, it might be removed by making the order as if at the time of arguing the demurrer, which seemed the best mode.

His honor ordered, that, besides the 5*l.* costs, to be paid as usual on a demurrer being allowed, the plaintiff should pay to the defendant the costs of the depositions on the examination in chief, but not of those on cross-examination.[1]

(g) See *Andrews v. Palmer*, 1 V. & B. 21. *Corbett v. Corbett*, *ibid.* 335. *Jones v. Jones*, 1 Cox, 184.

(h) 4 Bro. C. C. 545. Beames' Ord. Chan. 456. Mr. Beames, with his usual industry, has collected the following cases determined upon this order. *Griffith v. Wood*, 1 V. & B. 307. *Griffin v. Nanson*, Reg. Lib. A. 1796, fol. 578. *Kay v. Bradley*, *ibid.* fol. 449. *Lord Newark v. Gelzer*, and *Lord Newark v. Turner*, *ibid.* fol. 523. See also *Bailey v. Tanner*, mentioned in Beames on Costs, 223 in the note.

(i) 1 V. & B. 307.

(k) 1 Madd. 32.

(l) 2 Madd. 240, and 328.

[1] Vide S. C. 5 Russ. 163. *Towhley v. Deare*, 3 Beav. 217.

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 1822.—Adamson v. Blackstock and others.
 

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[\*118]

\*ADAMSON v. BLACKSTOCK and others.

1822, 10th and 17th December.—*Practice.*

An attachment for want of an answer to an amended bill cannot be obtained until the amendments have been entered in the six clerk's book, and it makes no difference whether the original bill has or has not been answered.

It was moved, on behalf of Greaves, one of the defendants, that an attachment which had issued against him for want of an answer to the amended bill, might be discharged, with costs for irregularity.

It appeared, that, in July last, when this cause came on to be heard, it was objected that the bill was a bill of revivor merely: whereas it ought to have been a bill of revivor and supplement. The court considered this a valid objection, and ordered the cause to stand over, with leave to the plaintiff to amend.

On the 24th July, the plaintiff obtained an order to amend, as he should be advised, amending the defendant's office copies; and afterwards subpoenas were served on the defendants to appear to and answer the amended bill. On the 9th November, Greaves entered his appearance; and on the 19th of the same month, the plaintiff's clerk in court gave notice to Greaves' clerk in court, that unless a commission to take his answer was sued out before the 25th November, an attachment would be issued against him. The commission was not obtained within that time, and the attachment issued on the 25th November. On the 30th November, on search being made in the cause books of the clerk in court, in which the amendments ought to have been entered, it appeared that no entry was made of any amendment, pursuant to the order to amend. On the 2d December, however, the plaintiff caused the entry to be made. Greaves' clerk in court, at the time when he received

[\*119] instructions to enter an appearance for him, applied to the six clerk, in whose division the cause was, to have the record of the amended bill: but was informed, that it was not in the study of the six clerk, and could not be found at that time.

By an affidavit filed on the part of the plaintiff, in opposition to this motion, it was stated that the record of the bill was amended in Trinity vacation, and that the other defendants had left their office copies to be amended, and that they had been amended accordingly; but that the defendant Greaves had not, prior to the issuing of the attachment, left his office copy of the bill to be amended.

Mr. Agar, in support of the motion, insisted on the uniform practice, that when a bill is amended there must be an entry in the book kept for that purpose at the six clerk's office. In the present case, he admitted that the six clerk had, before the attachment issued, done all that was necessary as to amending the bill, except that he neglected entering it in the book. That

1822.—*Green v. Thomson.*

neglect must be considered as fatal, and the entry made after the attachment issued, was too late.

Mr. *Bell*, for the plaintiffs, opposed the motion. The amendment was not such as required an answer, therefore no entry in the six clerk's book was necessary. The defendant had applied at the wrong place, having gone to six clerk's study, instead of going to his seat. Those defendants who had brought their office copies to the plaintiff's clerk in court, had them regularly amended; and if there was any irregularity in this case, it was owing to the conduct of the defendant himself, and not to the plaintiffs, who had \*done [\*120] all that was necessary on their part. *Lloyd v. Lloyd. (a)*

The Vice-Chancellor said, he would refer it to the six clerks to certify what was the practice on the point in question.

His Honor accordingly caused a question as to the practice, to be addressed to the six clerks; who thereupon returned the following certificate:—

"The six clerks humbly certify to your Honor, that an amended bill is not to be considered as on the file for the purpose of an attachment for want of an answer, before an entry is made of the amendments in the six clerk's book; and that there is not any difference in this respect between the amendments of a bill which has been answered, and the amendments of a bill which has not been answered.

"(Signed) Hanmer, for self and Brethren.

"Dated this 17 December, 1822."

The Vice-Chancellor, upon receiving this certificate, ordered the attachment and all proceeding thereon, to be discharged for irregularity, with costs. [1]

\*GREEN v. THOMSON.

[\*121]

1822, 10th and 18th December.—*Contempt.*

A defendant in order to clear his contempt, must not only tender the costs, but, if they are refused, must also obtain an order for discharging his contempt.

ONE of the defendants (*Reddell*) being in contempt for want of an answer, put in his answer, and tendered to the plaintiff the costs of his contempt. The plaintiff refused to receive the costs. The defendant, after the usual interval, obtained an order for the dismissal of the bill, for want of prosecution.

Mr. *Pepys*, for the plaintiff, moved to discharge the order for the dismissal of the bill, on the ground that it had been irregularly obtained, inasmuch as the defendant, at the time when he moved for it, was in contempt. When the costs of a contempt are refused, the party continues in contempt till the court makes an order on the subject. *Coulson v. Graham. (b)*

(a) 2 Cox. 431.

(b) 1 V. & B. 331.

[1] *Van Wessel v. Van Wessel*, 3 Paige, 38. *Kendall v. Beckett*, 1 Russ. 152.

1822.—*Esdaile v. Stephenson.*

Mr. *Treslove* opposed the motion.

The register (Mr. Walker) was referred to as to the practice, and the motion was ordered to stand over till the next seal day, that the practice might be ascertained. On that day the register furnished the following cases, which showed the practice to be as was contended for on the part of the plaintiff; *Rowe v. Jarrold*, 26 Feb. 1820, and *Jones v. Powde*, 7 Nov. 1822. The practice was laid down to be as follows, by

The VICE-CHANCELLOR:—Where a defendant is in contempt for want of an appearance or of an answer, and enters his appearance or files his [\*122] answer, and then tenders to the \*plaintiff the costs of his contempt, and those costs are refused, it is necessary, in order that he may be discharged from his contempt, that he should obtain an order for that purpose, which is made as of course, upon the six clerk's certificate of his appearance or answer, and upon the payment or tender of the plaintiff's costs of the contempt.

#### ESDAILE V. STEPHENSON.

1822, 19th December.—*Vendor and Purchaser—Interest—Compensation.*

Where the conditions of sale provide that interest shall be paid from a certain day, if the purchase be not then completed, the purchaser cannot relieve himself from payment of interest, by alleging that the delay in completing the contract was caused by the vendor; but it is otherwise where there is no express stipulation.

Quit rents, being incidents of tenure, are proper subjects of compensation.

*Quere*, as to the rent charges, which are not incidents of tenure; though the court has allowed them, when small, to be subjects of compensation.

THIS was a suit for the specific performance of an agreement for the purchase of an estate.

The conditions of sale stipulated, that, if the conveyance was not executed by the necessary parties, and the purchase money, paid on or before the 24th day of December 1819, the purchaser should pay interest on the purchase money, at 5*l.* per cent, until the purchase should be completed. The estate was subject to quit rents, for which the master had reported the proper compensation to be made out of the purchase money.

The cause now came on for further directions.

Mr. *Sugden*, on behalf of the purchaser, insisted, that it was the fault of the vendor, that the purchase had not been completed at the time stipulated in the conditions, and that he ought not, therefore, to benefit by his own de- [\*123] lay, by taking the subsequent interest at 5*l.* per \*cent, which was much more valuable than the mesne profits of the estate. He also insisted upon the hardship of compelling a purchaser to complete his contract, where there were quit rents on the property; on account of the difficulty it occasioned upon a re-sale of the estate in lots, where every purchaser who was not to pay the whole quit rents, was to be indemnified in respect of the part not to be paid by him.

1892.—*Glassington v. Thwaites.*

The VICE-CHANCELLOR:—Where there is no stipulation as to interest, the general rule of the court is, that the purchaser, when he completes his contract after the time mentioned in the particular of sale, shall be considered as in possession from that time, and shall from thence pay interest at 4l. per cent., taking the rents and profits. If, however, such interest is much more in amount than the rents and profits, and it is clearly made out that the delay in completing the contract was occasioned by the vendor, there, to give effect to the general rule, would be to enable the vendor to profit by his own wrong; and the court, therefore, gives the vendor no interest, but leaves him in possession of the interim rents and profits.[1]

In the present case, the interest does not depend upon any rule of the court, but upon the express stipulation of the parties; and the terms of that stipulation apply to every delay however occasioned. It is highly probable, but I cannot in reasoning assume it as a necessary consequence, that the interest must, under all circumstances, exceed the mense profits, so as to infer from thence, that the true intention of the parties must have been that the purchaser should pay interest at 5l. per cent., only when the delay in completing the contract was occasioned by himself. The purchaser must, under \*the circumstances of this case, pay interest according to the terms of [\*124] the conditions of sale.

With respect to the other point, I admit the hardship insisted on by the purchaser in this case. But it is now settled, that quit rents are subjects of compensation, probably, because they may be regarded as incidents of tenure.[2] Rent charges are not incidents of tenure, but are created by the voluntary act of the vendor, or those under whom he claims. And it would be a good rule, that a purchaser should not be bound to complete his purchase, unless they were noticed in the agreement or conditions of sale. I fear that the habit of the court has been not to proceed upon this distinction between quit rents and rent charges, but to compel the purchaser to complete where the rent charge is small.

GLASSINGTON v. THWAITES and others..

1892, 20th December; 1893, 11th January.—*Partnership. Practice.*

A temptation to the abuse of partnership property is not sufficient to induce the court to interfere by injunction.

All the partners in a publication, except one, being also partners in a rival publication, an injunction to restrain the using of the effects of the former partnership, to assist the latter, in consideration of an annual sum, was refused, where there had been an agreement, permitting the use on those terms, which had been acted on for many years. But the injunction was granted to restrain the use of partnership effects, not included in the agreement.

[1] Vide *Winter v. Blades*, 2 Sim. & Stu. 396, note.

[2] Vide *Warren v. Batesman*, Flan. & Kel. 455, note.

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1823.—*Glasington v. Thwaites*.

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On a motion for an injunction, affidavits filed before the answer, may be read, where the plaintiff, by saving the notice of motion till a future day, enabled the defendant to file his answer before the motion was made.

THE plaintiff, as one of the partners in the Morning Herald newspaper, filed this bill against the other partners, praying for an account of the partnership dealings, and an injunction to restrain the defendants from using the partnership effects in the publication of another newspaper called the English Chronicle, of which they (but not the plaintiff) were proprietors.

[\*125] \*The Morning Herald was divided into ten shares and one half.

The plaintiff was entitled to one of these shares. The defendant, Thwaites, had six shares and a half, and the other defendants were proprietors of the remaining three shares. The articles of partnership under which these shares were held, were dated in July 1816. By one of the clauses in this deed, it was provided that a general meeting of the proprietors should be held every week, at such time and place as should be fixed by the major part of the proprietors, whose votes should, on all occasions, be and be considered, not by number, but in proportion to the value of their respective shares; and that, at every such meeting, all matters relating to the management of the newspaper should be settled; and that all rules, regulations and orders, touching the management of the newspaper, made by the votes of the majority in value of the proprietors and parties interested therein, and then present, should be binding and conclusive on all the parties to the deed. This deed was executed by the plaintiff, as well as by the other proprietors.

For some time previously to the year 1816, an evening newspaper, called the English Chronicle, had been carried on, and the proprietor of that paper had been also one of the proprietors of the Morning Herald; and both these papers had for many years been carried on and published at the same place. In the year 1804, an agreement was made between the proprietor of the English Chronicle and the proprietors of the Morning Herald, by which the former paper was allowed to have the use of the types and other effects belonging to the partnership of the Morning Herald, in consideration of the sum of 200*l.* a

year. This agreement subsisted in 1816, and the proprietors of the [\*126] Morning \*Herald, under the deed of July 1816, continued to act on the same agreement, and to allow to the English Chronicle the use of the types and partnership effects, and to receive the annual sum of 200*l.* as the price of this convenience.

In the year 1821, the proprietor of the English Chronicle offered to sell that paper to the proprietors of the Morning Herald, who, with the exception of the plaintiff alone, accepted the offer, and purchased that paper. Thus the two newspapers were united under the same proprietors, except that the plaintiff had a share in the Morning Herald only, and had no interest in the English Chronicle. After this purchase, a new agreement was entered into, by which the English Chronicle was to pay an annual sum of 250*l.* instead of 200*l.* to the Morning Herald, for the use of the types, &c. Under this new agreement,

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 1823.—*Glassington v. Thwaites.*


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the plaintiff and the other proprietors of the *Morning Herald* continued to allow to the *English Chronicle* the use of their types and partnership effects, till August 1822, when the plaintiff caused a notice to be served on the defendants that this agreement must be discontinued, and none of the effects of the *Morning Herald* used for the *English Chronicle*.

The plaintiff stated, by his bill, that he had for many months been excluded from his rights as a partner in the *Morning Herald*, and that the effects of the partnership in that paper were misapplied to the use of the *English Chronicle*; that, intelligence obtained at the expense of the *Morning Herald* had been first used for the *English Chronicle*, by which means it was rendered of no value to the *Morning Herald*; and that the name of the plaintiff was used without his consent, as \*publisher of the *English Chronicle*. The bill, [\*127] therefore, prayed that an account might be taken of the partnership dealings and transactions under the deed of July 1816; and that the defendants might account for the profits made by them of intelligence first published in the *English Chronicle*, though obtained at the expense of the *Morning Herald*; and for an injunction to restrain the defendants from using the types or partnership effects of the *Morning Herald* for the *English Chronicle*, and from using the plaintiff's name as the publisher of the latter paper.

The defendants, by their answer, insisted on the terms of the partnership deed of July 1816. That the plaintiff had greatly misconducted himself, and had not duly accounted for balances of the partnership money in his hands, but was indebted to the concern to the amount of 300*l.* and upwards; that, in consequence of his misconduct, the defendants, who were the majority in number and in value of shares, had been compelled to exclude him from interfering in the management of the paper; that the agreement with the *English Chronicle* was beneficial to the *Morning Herald*, not only on account of the annual sum of 250*l.* which was paid for the use of the types and other effects, but also because the *Morning Herald* had the use of the types composed for new matter in the *English Chronicle*, and had also the general use of the types of that paper. They also insisted on the fact, that the plaintiff had, for many years, consented to this agreement, as beneficial to the *Morning Herald*, and that no new circumstances had occurred to render it less beneficial than at former periods. It appeared that intelligence, obtained at the expense of the *Morning Herald*, had on one occasion only, (many months before this bill \*was filed) been first used in the *English Chronicle*; and that the [\*128] plaintiff's name had only been used on one occasion (through the mistake of a workman and without the knowledge of the defendants) as the publishers of the *English Chronicle*.

The court was now moved, on behalf of the plaintiff, for an injunction to restrain the defendants from using the compositors, types, or other partnership property of the *Morning Herald*, for the use of the *English Chronicle*, and from using the name of the plaintiff as the publisher of the latter paper.

Mr *Bell*, and *Roupell*, in support of the motion, insisted on the facts stated



1893.—*Glasington v. Thwaites*.

by the plaintiff in his bill, and supported by his affidavit. The plaintiff sought for an injunction, as the means of preventing a misapplication of the partnership effects for other purposes than those of the partnership; and the principles of the court, in cases of partnership, recognized the right to an injunction in cases of this nature.

Mr. Agar and Mr. Parker for the defendants:—

I. This is not one of those cases in which the court will interfere by an injunction at this stage of the cause. In the present case, the injunction is sought, for the purpose of furthering the articles of partnership. There is no principle of the court on which an injunction can be granted for such a purpose. The only cases in which the court grants an injunction on motion are, 1st, where waste, or an injury in the nature of waste, is threatened or committed; 2d, where it is to prevent an irremediable injury. If the court were to extend the practice of granting injunctions to aid the execution of covenants in articles of partnership, it would be called upon to interfere in the management of almost every partnership in the kingdom. (a)

II. The bill does not pray for a dissolution of the partnership, and yet it prays for an account of the partnership dealings and transactions. It is the settled principle of the court not to interfere in a partnership concern, unless the bill prays for a dissolution of the partnership. *Forman v. Horn* [\*130] *fray*. (b) In that case it was expressly decided there can be no bill for an account between partners, unless it also prays for a dissolution.

(a) In *Peacock v. Peacock*, 16 Ves. 51, it was said by the Lord Chancellor, that the court has interposed in cases of partnership, upon principles, not the same, but analogous to those on which it interposes in the case of waste. In a very able work on the law of partnership, lately published, it is laid down as the doctrine deduced from the cases, and in the words of Lord Eldon, in *Marshall v. Colman*, "that courts of equity will interfere where a breach of any of the covenants contained in the articles of partnership has been committed, if the breach be so important in its consequences as to authorize the party complaining to call for a dissolution of the partnership." Gow on Partnership, 135. There seems, however, to be some inconsistency in the doctrines applied to the various cases which have been reported; See *Marshall v. Colman*, 2 J. & W. 268. *Goodman v. Whitcomb*, 1 J. & W. 592. *Smith v. Froment*, 2 Swanst. 330.

(b) 2 V. & B. 329. As to the cases in which it has been held necessary that the bill in a suit between partners, should pray for a dissolution of the partnership—see *Harrison v. Armitage*, 4 Madd. 143. *Marshall v. Colman*, 2 J. & W. 268. *Goodman v. Whitcomb*, 1 J. & W. 592. *Master v. Kirton*, 3 Ves. 74. It does not seem very easy to reconcile the principles which have been laid down in various cases, as to the dissolution of partnerships for a term of years, before the term has expired. In *Goodman v. Whitcomb*, 1 J. & W. 593, it is said by Lord Eldon, that the court will not interfere to dissolve the partnership, (before the period fixed in the contract) unless there be "conduct amounting to an entire exclusion of the partner from his interest in the partnership." But when that proposition was laid down, the court had fallen into an analogy which seems somewhat fanciful, between the doctrine of the ecclesiastical court as to the dissolution of the matrimonial contract, and the doctrine of the court of chancery as to the dissolution of partnerships in trade. See his lordship's excellent judgment, in *Marshall v. Colman*. In *Baring v. Dix*, 1 Cox, 213, the court dissolved the partnership before the term had expired, (although one of the partners refused to consent to the dissolution) on the ground that it could not be beneficially continued, with a view to its object. In *Chapman v. Beach*, 1 J. & W. 594, it was held that a breach of faith between the parties, was a reason why the court should decree a dissolution; and nothing was said as to

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III. The injunction is sought to restrain acts which were done for many years with the consent of the plaintiff himself; acts done under an arrangement which was deemed beneficial to the *Morning Herald* by the plaintiff, long before, and even since, the defendants had become proprietors of the *English Chronicle*. The effect of granting the injunction now, would be instantly to destroy the *English Chronicle*.

The Vice-Chancellor was at first inclined to grant the injunction; but said, that as the practice complained of had existed for some time; as the injunction, if granted now, could not be dissolved till the first seal before next term (this being the last day on which the court would sit before the Christmas vacation;) and as the immediate effect of the injunction might be to ruin the concern, although the superior court on appeal should be of opinion it ought never to have issued; he should not deliver his judgment on this motion, till after the vacation.

\*The VICE-CHANCELLOR:—The practice complained of by this application, is defended as being the act of a majority of the partners, who, by the express terms of the partnership articles, are entitled to bind the minority; and the plaintiff is the only partner who objects to it.

And it is further stated, that the plaintiff himself concurred in the propriety of this practice, until his co-partners purchased this evening paper, and that it is the same thing, in effect, as to the interest of the plaintiff, whether the evening paper belongs to his co-partners or belongs to strangers.

The right of the majority to decide, is necessarily confined to matters which occur in the conduct of the partnership concern. [1]

All newspapers are to some extent rivals. The competition is more immediate between two morning papers and two evening papers; but there is necessarily some degree of rivalry between a morning and an evening paper, especially in the country. It might, therefore, have been made a question, wheth-

exclusion of any of the partners from their interest in the partnership. As to other cases, in which dissolution before the expiration of the term has been decreed on other grounds than those of entire exclusion of a partner from his rights; see *Beaumont v. Meredith*, 3 V. & B. 180, and the cases collected in Mr. Gow's *Trusts*, 281.

*Query*. Whether the court will ever interfere on an interlocutory application for a receiver or injunction, in the case of a partnership occasioned by the acts of the parties, unless on circumstances clearly established, of fraud, entire exclusion, or gross misconduct? [A partnership contract may be annulled in chancery before the time fixed for its duration, where the purposes for which it was entered into can be no longer served; as where one partner acts with bad faith, or excludes the other from his proper share in the business, *Kennedy v. Kennedy*, 3 Dana, (Kentucky,) 240. Mere dissatisfaction by one partner will not authorize him to file a bill for a dissolution, nor will he be allowed an injunction, or a receiver be appointed; *Henn v. Walsh*, 2 Edw. 129. There are circumstances which *ipso facto*, work a dissolution of a partnership, as death, insanity, or bankruptcy of a partner; and where the partners, residing in different countries, a war breaks out between the countries of their respective residence; *Griswold v. Waddington*, 15 Johns. Rep. 57, S. C., affirmed in error, 16 Johns. Rep. 437: *Seaman v. Waddington*, 16 Johns. Rep. 510.

[1] It is competent for one co-partner to constitute another his agent, during his own absence; and thus in a partnership of three persons, preserve the right of majority. *Kirk v. Hodgson*, 3 Johns. Ch. Rep. 401.

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er it would be a due act of management in the partnership concern of a morning paper, to assist with its property and its labor the publication of any other newspaper, so as to enable the majority of the partners in that respect to bind the minority. But that question does not arise; because the plaintiff himself is to be considered as a party to the practice before his co-partners became the proprietors of the evening paper; and because there is evidence that the proprietors of other morning papers have adopted the same practice with respect to other evening papers, so as to form a sort of usage in the

[\*132] \*trade to this effect. And it is to be considered, that the annual sum paid by the evening paper, for the accommodation afforded to it, outweighs the danger of increased competition.

The true question here is, whether it makes any difference, that the other proprietors of the Herald have now become the proprietors of the evening paper; and I think it does not make a material difference. It is true, that a considerable part of the expense of a newspaper is occasioned by procuring information: and if some of the proprietors of a morning paper are also the proprietors of an evening paper, they may have a stronger interest to promote the success of the evening paper than of the morning paper, and a strong temptation to use the information obtained at the expense of the morning paper for the benefit of the evening paper. This temptation forms a powerful objection in all cases to the partner in the concern of one newspaper being permitted to be a partner in the concern of any other newspaper. But it is an objection founded on the principle of policy and discretion, against which, parties may protect themselves by their contracts; and accordingly, it is a common covenant in such partnership articles, that no partner shall be the proprietor of any other newspaper. In the present case, there is actually a covenant, that the proprietors will not be concerned in any other morning paper, which by implication, affords the conclusion, that it was the intention of the parties, that they might engage in the concern of any evening paper.

Where there is no such covenant of restraint, it is clear, that at law, at partner in one newspaper may be a proprietor in any other newspaper;

[\*133] and in this case, \*equity must follow law; and it cannot be intended, that the parties meant to impose a restraint, which they might have expressed, and have not expressed, and where it is plain their attention was directed to the subject.

The principles of courts of equity would not permit that parties bound to each other by express or implied contract to promote an undertaking for the common benefit, should any of them engage in another concern which necessarily gave them a direct interest adverse to that undertaking [1] But the argument here is, not that the defendants, by becoming the proprietors of the evening paper, place themselves in a situation in which they are necessarily required to betray their duty to the morning paper; but that, if

[1] *Wilde Caldwell v. Leiber*, 7 Paige, 483.

1893.—*Glassington v. Thwaites.*

their interest be greater in the evening paper than in the morning paper, they are exposed to a temptation to be dishonest and to betray their duty to the morning paper. If they act honestly, it is immaterial to the morning paper whether the defendants are or not the proprietors of the evening paper. And for this reason it is, that it makes no difference in the present case that the defendants have become the proprietors of the evening paper.

His honour refused the injunction generally; but allowed the plaintiff to take an injunction to restrain the defendants from publishing in the *English Chronicle* any information obtained at the expense of the *Morning Herald*, until it should have been first published in the *Morning Herald*.<sup>[1]</sup>

\*In this case, the notice of motion served by the plaintiff expressed [\*134] that the injunction would be moved for on the 16th December, and the affidavits of the plaintiff were filed before that day; but the counsel for the plaintiff did not bring on the motion on the 16th, but saved the notice till the 20th of December, which was the next day for motions. Before the motion was made on the 20th, the defendants filed their answer.

When the motion was made, Mr. *Agar*, and Mr. *Parker*, for the defendants, insisted that the plaintiff ought not to be allowed to read his affidavits, because the answer was filed.

Mr. *Bell*, and Mr. *Roupell*, for the plaintiff, insisted on their right to read the affidavits, as the answer had been filed after the day fixed for the motion by the notice.

The Vice-Chancellor held, that the affidavits might be read in opposition to the answer; and that the circumstance of the plaintiff having afforded an opportunity for the answer, by saving his notice of motion made no difference (a.)

(a) See *Goodman v. Whitcomb*, 1 J. & W. 589. [*Atkinson v. Kemble*, 7 Sim. 638.]

[1] In *Snowden v. Noah*, *Hopkins*, 317, it appeared that the defendant Noah, was the editor, but not the proprietor of a certain newspaper establishment called the *National Advocate*; and immediately after the sale of that establishment by its former proprietor to the complainant, Noah established another paper, under the title of the *New York National Advocate*. Noah sends the new paper to the subscribers of the former *National Advocate*, and solicits their support and that of the public to his paper. An injunction was asked, but denied. "The business of printing and publishing newspapers," says Ch. Sanford, "being equally free to all, the loss to one newspaper establishment, which may follow from the competition of any rival establishment, is merely a consequence of the freedom of this occupation, and gives no claim to legal redress. But a newspaper establishment is also a subject of property; and so far as the rights of such an establishment are private and exclusive, this species of property, like any other, is entitled to the protection of the law."—"The subject in respect to which an injunction is asked, is what is called the good will of the establishment."—"This object is distinctly avowed," (by Noah,) "and an open appeal is made to the friends of the *National Advocate*, and to the public, to give their support to the new paper." The Chancellor did not consider that there was here an invasion of the private rights of Snowden, as proprietor of the *National Advocate*, and that no person could be deceived or misled by the existence or publication of the *New York National Advocate*. It was "merely a competition, in which there was no imposture or deception." See further *Barfield v. Nicholson*, 2 Sim. & Stu. 1, and note, *ibid*.

1823.—Webster v. Threlfall.

[\*135]

## \*WEBSTER V. TRELFALL.

1823, 16th January.—Practice.

Where the draft of an amended bill is signed by the same counsel who signed the draft of the original bill, and no new engrossment is required, counsel's name need not be repeated on the engrossment.

Where a defendant enters his appearance *gratuité*, the time within which he must answer or sue out a commission, is to be calculated from the date of his actual appearance, and not from that at which the *subpoena* would have been served, if he had waited till the regular service.

A DEMURRER had been put in to the original bill in this cause, and, on argument, was allowed; but the plaintiff had leave to amend his bill. The bill was amended accordingly; and the draft of the amendments was signed by the counsel, whose signature appeared to the original bill. The amendments were interlined in the engrossment of the original bill, and the names of the counsel remained after the amendments had been made, without being repeated, and without any thing appearing on the record to indicate that the amendment had been signed by counsel.

The defendant now moved, that the amended bill might be taken off the file for irregularity, because it did not appear to be signed by counsel.

Mr. Bell, and Mr. Spence, for the defendant.

The court must have the sanction of counsel for what appears on its record. If the name of counsel attached to the record of an original bill, is to be considered a sufficient sanction for any amendments which may afterwards be made, it is obvious that the court would be liable to have amendments interlined without the protection of signature by any counsel. If the name attached to the original bill is sufficient, then any solicitor's clerk may make what amendments he pleases under the sanction of the first signature.

[\*136] Such a practice is subversive of the invariable policy of the court. *Pitt v. Maclew*(a) is a case in point.

(a) Through the kindness of Mr. Bickersteth, we are enabled to give the following note of this case:—

## PITT V. MACLEW.

1820, 12th May.—Bill, amended by interlineation, ordered to be taken off the file for irregularity, neither the draft nor the engrossment of the amendments being signed by counsel, though there was no new engrossment of the bill.

The original bill in this case was signed by Mr. Parker, as counsel for the plaintiff.

On the 25th April 1820, the plaintiff obtained an order to amend the bill. Having obtained this order, the plaintiff went himself personally to the six clerk's office, unaccompanied by any solicitor, and, having got access to the engrossment of the bill, he amended it by making several interlineations. These amendments were not made from any draft signed by counsel, nor was the name of counsel repeated on the engrossment, as having sanctioned the amendments.

On the 19th May, a motion was made on behalf of one of the defendants, that the amended bill might be taken off the file, for irregularity, because it was not signed by counsel. An affidavit in support of the motion was made by the solicitor of the defendant, which stated, that he (the solicitor)

1823.—*Mellish v. Mellish.*

Mr. *Koe* opposed the motion, and stated that he had himself signed not only the draft of the original bill, but also the draft of the amendments. He stated also, that the practice was understood to be, that the repetition of the name of counsel to the engrossment was not usual, where the draft of the amendments was signed by the same counsel who had signed the original bill.

\*The Vice-Chancellor, said he must refuse this motion with costs, [\*137] because it was against all practice that the name of counsel should be repeated to an amended bill, where there is no new engrossment; and because, when counsel amends his former draft, which has his signature to it, his signature is to be applied as well to the amendments as to the original draft. If it is not necessary to repeat the name upon the draft, it could not be necessary to repeat it upon the record. If another counsel were to make the amendment, then it would be necessary that there should be a second signature. [1]

In this case the defendant had appeared gratis, and he insisted that as he had done so, without service of the subpoena, he was only bound to answer at such time as would have been allowed by the rules of the court, if he had waited the regular service of the subpoena. The time, therefore, was to be calculated from the date at which the subpoena would have been served in the regular course.

The Vice-Chancellor held, that the circumstance of appearing gratis, made no difference, because the time allowed by the rules of the court after appearance, necessarily applies to the actual appearance, without regard to the motive, and that it would be highly inconvenient if it were otherwise.

\*MELLISH V. MELLISH.

[\*138]

1823, 16th January.—*Guardian and ward.*—*Injunction.*

Where a guardian, after his ward attains full age, continues to manage the property at the request of the ward, and before the accounts of his receipts and payments during the minority are settled, it is, in effect, a continuance of the guardianship as to the property; and he must account on the same principle as if they were transactions during the minority.

Under these circumstances, an injunction was granted, on terms, to restrain the guardian from proceeding in an action to recover the balance claimed by him on account of the transactions after his ward came of age.

tor) had applied to Mr. Parker, to know whether he had signed the amended bill, and was informed by him that he had neither signed it, nor authorized any other person to sign it for him.

Mr. *Bickersteth* for the motion.

The Vice-Chancellor ordered the amended bill to be taken off the file, and the plaintiff to pay the costs. [Where an amendment of a bill on file, may be made, as of course, yet a rule must be entered for the purpose—"The amendments should be distinctly shown, so that they may be easily perceived. They are either to be made by interlineations, or by insertions in the margin, if short, or by being separately engrossed, and annexed to the original bill. If the amendment be of such a nature as require the original bill to be re-engrossed, they must then be designated in some way sufficient to point them out to the defendants." *Lucas v. Graham*, 4 Johns. Ch. Rep. 170.]

[1] *Burch v. Rich*, 1 Russ. & Mylne, 156.

1c23.—*Mellish v. Mellish.*

THE defendants were the paternal uncles of the plaintiff, and had been her guardians during her minority. The bill prayed for an account against them; and for an injunction to restrain the defendant, William Mellish, from proceeding in an action at law, which he had brought against the plaintiff, to recover the sum of 22,325*l.* 10*s.* 2*d.* alleged to be the balance due to him, on account of his receipts and payments, since she had attained the age of twenty-one years.

John Mellish died in 1798, leaving the plaintiff, Catherine Martha Mellish, his daughter and only child, at that time an infant only two years of age. He made his will, of which he appointed his three brothers, the defendants in this cause, William, Edward, and Thomas Mellish, the executors; and he also appointed them guardians of the plaintiff.

The bill in this cause was filed several years after the plaintiff had come of age; and it set forth the will,—stated various acts of improvidence and mismanagement, by the defendants, as to the property claimed by her under the will; that she had been unable, for several years, to obtain from the defendants a statement of their accounts; that, when the accounts were delivered, it appeared that 14,372*l.* 15*s.* had been laid out, during her minority, in the purchase of lands for her, but that these lands were conveyed to the defendants, and were still vested in them, although they had charged the plaintiff with the money laid out on them; that they had continued in the management of her affairs, \*after her attaining the age of twenty-one; and that it appeared by accounts lately delivered, that they claimed a balance of 22,325*l.* 10*s.* 2*d.* to have become due to them from the plaintiff, since she had attained twenty-one, although only 11,105*l.* 8*s.* 2*d.* had, in fact, been advanced to her since that time, and that an action had been brought against her by the defendant, William Mellish, to recover this alleged balance of 22,325*l.* 10*s.* 2*d.* The bill charged, that the accounts on which this balance appeared, were, in fact, only a continuation of the accounts during the minority; that they were made out in the name of William Mellish only, although the other defendants were equally liable with him; and that if proper accounts were taken, it would appear that a large balance was due to the plaintiff. The prayer of the bill, therefore was,—First, for an account of the property to which the plaintiff was entitled under the will;—Secondly, for an account of the estates purchased with the 14,372*l.* 15*s.* and that the defendants might be decreed to convey them to the plaintiff;—and Thirdly, for an injunction to restrain all proceedings at law by the defendants, in respect of any of their accounts, and, especially, to restrain proceedings in the action brought by William Mellish.

The answer of the defendants denied all the charges of improvidence and mismanagement; and stated, that the defendant, William Mellish, alone had acted in the receipts and payments on accounts of the plaintiff's affairs; that the defendants were very desirous that the plaintiff should be informed of the state of her affairs when she came of age; and that, accordingly, in the month

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of January 1817, which was a few months before she attained the age of twenty-one, the defendant, William Mellish, wrote her the following letter :—

“ \*As the period at which you will be of age is nearly arrived, and [\*140] as you will remain in town with your aunts for some days previous to your joining the party at —————; I have transmitted to you some papers which I wish you, during that time, to peruse with the greatest attention. Your uncle and myself were, upon the perusal of your father's will, so doubtful as to the proper construction that ought to be put upon it, that, without delay, we consulted three of the most eminent counsel, at that time, at the bar, Sir John Mitford, now Lord Redesdale, afterwards Chancellor of Ireland, the late Mr. Shadwell and Sir Samuel Romilly; and amongst the papers sent you, you will find a copy of your father's will, as well as of the case laid before counsel with the several opinions thereon. We have been guided by their opinions in all legal points respecting the property that you took under the will, though, in the management of your concerns, we have, in some instances, deviated from the strict legal line of conduct pointed out by them, conceiving it was for your benefit to do so; we should not have fulfilled our duty as your guardians, if we did not take upon ourselves that responsibility, rather than forego the opportunity thus offered of eventually improving your property. Under these circumstances, it would be extremely improper in us to proceed to any settlement of your account, without having them inspected and examined by some respectable solicitor on your behalf, and for the same reason, it would be equally improper in us to name or give you any recommendation as to the person to be employed by you for that purpose upon the subject. We do not conceive that there can be any person so proper for you to consult as the nearest \*relations to your mother, and we know that [\*141] they will give you every assistance and advice in their power.”

In consequence of this letter, a solicitor was appointed by the plaintiff; and under his management, on the 18th of June 1817, a few months after she attained twenty-one, the accounts of the plaintiff with the defendants in respect of transactions under the marriage settlement of her father and mother, but not in respect of her affairs under the will, were finally settled and signed by her, and she executed a release as to these accounts to the defendants.

The first application by the plaintiff for a settlement of the other accounts (which were those mentioned in the bill,) was in May 1817; and in the letter by which she made this application, she stated that it was her intention to go abroad, for the purpose of visiting the continent, on the 20th June following; and, therefore, begged that the accounts might be prepared as speedily as possible. The defendant, William Mellish, in answer to this letter, begged her to defer her journey for sometime longer, until the accounts could be prepared, and added, that they were then in progress.

At the time when the plaintiff came of age, William Mellish, who had frequently communicated with her on the state of her affairs, gave her a written



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statement of her annual income, so far as he was then able to ascertain it. She did not wait till the accounts were prepared, but went abroad on the 2d of July, 1817. Before she went by a letter, dated 23th June, 1817, and addressed to the defendant, William Mellish, she requested him to continue in the management of her affairs. That letter was as follows:—

[\*142] \*‘‘I have often thought it would be giving too much trouble to ask you still to continue the superintendence of my concerns at Hamels; but if that is not the case, I shall be infinitely indebted to you and my uncle Tom for doing so; and I am perfectly aware of the advantages that have hitherto resulted to myself from your management of them.”

In consequence of this letter, the defendant, William Mellish, continued to act on behalf of the plaintiff, and to receive the rents and profits of her property; but he stated that he considered his management of her property under the authority of this letter, as a continuance of the management, different from what it had been during the minority, and on a new footing; and, therefore, that he had kept new accounts of it, distinct from those which he had kept during the minority and the guardianship.

After the plaintiff had gone abroad she wrote repeatedly to the defendant, William Mellish, requesting that she might be furnished with the statement of the general accounts of her affairs to the end of her minority. But, in answer to these applications, he always stated, that her own presence was necessary in order to have the accounts properly settled. In September, 1818, the plaintiff wrote to say, that she had appointed Mr. Charles Warren to examine the accounts on her behalf. An abstract of the accounts was accordingly examined by this gentleman, who approved of them, on her behalf, and expressed his conviction that the defendants had, in all matters, acted as was best for her interests.

[\*143] In January 1819, the plaintiff appointed new solicitors \*to act for her; and on the 5th July, 1819, the whole of the minority accounts were delivered to her by the defendant William Mellish; and, on the 10th of the same month, he delivered his accounts of her affairs during the period since she had attained the age of twenty-one. By the minority accounts, there appeared to be a balance of 13,194*l.* 9*s.* 4*d.*, due from the plaintiff to the defendant William Mellish. For the recovery of this sum no action was brought. It was for the balance of 22,325*l.* 10*s.* 2*d.* which appeared due to him on the other accounts, since the minority, that the action was brought; and, of this sum, the defendant William Mellish stated that 14,947*l.* 4*s.* 8*d.* was due for money advanced by him to the plaintiff herself, personally, since she had attained twenty-one; and the rest was for sums paid to various persons on her account, after deducting all sums received by him in respect of her property.

The answer also stated, that, when these accounts were delivered, the

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plaintiff had refused to settle them, unless the defendants would agree to open the accounts under the marriage settlement, which had been signed and settled by the plaintiff in June, 1817. And the defendants said they did not believe that any of the items in the accounts, since she attained the age of twenty-one, depended on any disputed items in the minority accounts; and that the plaintiff, although she had been repeatedly pressed to point out any items in the minority accounts which she disputed, had refused to do so; and that the defendants were, therefore, ignorant what the items were which she disputed.

As to the estates purchased for her during the minority, it was stated that the plaintiff herself had, since \*she came of age, elected to take [\*144] these estates, was in possession of the title deeds, and in receipt of the rents and profits.

The plaintiff had obtained the common injunction for want of an answer; and an order having been obtained to dissolve the injunction nisi, upon the coming in of the answer, the plaintiff now showed cause, on the merits, against dissolving the injunction.

*Mr. Wetherell*, and *Mr. Pepys*, for the plaintiff, insisted that the management, since she had come of age, was a continuance of that during the minority, and was to be treated on the same footing; and, therefore, that the guardian could not be allowed to recover an alleged balance on a disputed account, till the accounts had been taken under the direction of the court, and that the parties were to be considered as being involved in an account depending on equitable principles.

*Mr. Bell*, *Mr. Horne*, *Mr. Heald*, and *Mr. Pechell*, for the defendants.

I. The account, subsequent to the period when the plaintiff came of age, is a common legal account, and the relationship of guardian and ward ceased with the minority. Admitting that the accounts during the minority cannot be made the subject of a demand at law, but must be settled in this court, there is no principle on which the defendant, William Mellish, can be restrained from proceeding at law to recover money advanced by him to the plaintiff since she attained the age of twenty-one. When she began to draw on him for money, after she came of age, there was an end to the relationship of guardian and ward. He was then managing her affairs, not in that situation, but under the \*authority given to him by her letter of the [\*145] 24th June 1817. The substance of that letter was, the continuance of the management on a new footing. There was from that time a new agency and a new account.

II. Admitting that as to the management, is was, under this letter, to be considered as on the old footing. It is impossible to say that of money actually advanced—of payments made to the plaintiff by Mr. William Mellish, out of his own pocket. These cannot be considered as the advances of a guardian to his ward. It was by her conduct and her acts after she came of age, that he was involved in this new account; for, if she had not gone abroad,

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 1823.—Wynne v. Griffith.
 

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the accounts would have been sooner settled, or if disputed, these advances would not have been made.

III. It is not alleged any where in the bill that the question could not be tried at law as to this account on which the action has been brought.

THE VICE CHANCELLOR :—The balance claimed by a guardian from his ward, can never be ascertained in a court of law, because it depends upon principles peculiar to a court of equity ; and in order to induce this court to restrain the action at law, it is enough to state the relation in which the parties stood to each other. [1] I consider that the unbroken continuance of the management of the property by the guardian, after the plaintiff had attained her age, is, in effect, a continuance of the guardianship as to the property ; and that the same principles must be applied to this account as to the accounts during the minority. And, of consequence, the plaintiff is entitled to [\*146] maintain the injunction. The question is \*only as to the terms to which the plaintiff must submit. It is not denied by the plaintiff, that certain sums, exceeding altogether 14,000 l. were advanced to her personally, by the defendant, William Mellish, after she attained her age, and her counsel admit that they cannot infer from the present state of the pleadings that the balance claimed by the defendants will be reduced to a sum less than that 14,000l.

Let the injunction, therefore, be continued upon the terms of the plaintiff paying to the defendant, William Mellish, the amount of the sums so advanced to her, personally, since she attained her age, without prejudice.

Mr. Bell, for the defendants, pressed the court to require an undertaking from the plaintiff to pay interest upon any ultimate balance. But the Vice-Chancellor declined this, considering that the court could hereafter take into consideration the question of interest, as far as it depended upon the injunction.

This motion was heard on appeal before the Lord Chancellor. His lordship on the 20th March, affirmed the decision as to continuing the injunction, but ordered the plaintiff to pay into court the whole sum of 22,325l. 10s. 2d.

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 [\*147]

\*WYNNE V. GRIFFITH.

1823, 31st November.—*Vendor and purchaser.—Practice.*

The court will not compel a vendor to pay the deposit money into court, though he retains possession of the estate, if the delay in the completion of the contract is occasioned by the purchaser.

A defendant is not a party seeking the aid of the court, and, therefore, is not entitled to apply for an interlocutory order, for his own relief or security, as to the subject matter of the suit, unless the object of his motion may be imposed as a condition on an order applied for by the plaintiff.

[1] The jurisdiction of chancery, over guardians, however appointed, is established from a variety of cases. For the American cases, vide Amer. Ch. Digest, Guardian and Ward, III, V.

1823.—*Wynne v. Griffith.*

THIS was a bill by the vendor for the specific performance of an agreement for the sale of an estate, and for an injunction to restrain the defendant, the purchaser, from proceeding in an action to recover the deposit money of 1,000*l*. One of the conditions of sale was as follows:—"The purchaser of each lot to pay down immediately to the vendor's agent, for his use, a deposit of 10 per cent., in part of the purchase money, and to sign an agreement for the payment of the remainder, on or before the 16th day of June next; when he is to be let into possession of the premises, and to be entitled to the growing rents from thenceforth."

The sale took place in December 1819; and the defendant immediately paid the sum of 1,000*l*. as a deposit. This was less than 10*l*. per cent., as the purchase money was 14,610*l*. The plaintiff delivered an abstract of his title within the time fixed by the conditions of sale, and the title was approved of by counsel, on behalf of the defendant. At this time the same solicitor acted for both plaintiff and defendant. The latter afterwards employed a new solicitor, and being, as the plaintiff alleged, unable to raise money to complete the purchase, the opinion of another conveyancer, as to the validity of the title, was taken on his behalf. This latter counsel raised some objections to the title, which were, however, removed. Afterwards, other objections were raised, which were either removed, or could, as the plaintiff alleged, be satisfactorily answered. During the whole of this discussion as to the title, the plaintiff remained in possession of the estate; and in July 1822, [\*148] an action was brought against him by the defendant, for the recovery of the deposit of 1,000*l*. The plaintiff then filed this bill, and having obtained the common injunction for want of an answer; after the answer was put in, the injunction was continued on the merits.

The court was now moved, on the part of the defendant, for an order to compel the plaintiff to pay into court the deposit money of 1,000*l*.

Mr. *Horne*, and Mr. *Willis*, in support of the motion, insisted, that it was a general rule, that the deposit was to be considered as part of the purchase money, and that the plaintiff, as vendor, could not be entitled to retain possession of the estate and of part of the purchase money, at the same time.

Mr. *Sugden*, and Mr. *Newland*, for the plaintiff, opposed the motion; insisting, first, that the defendant was not entitled to come before the court with such a motion against the plaintiff; and that, even if he were entitled to have the money paid into court, he could only be entitled to insist on it by a cross bill. (a)

Second, admitting that the court could entertain such a motion, the defendant in this case could not be entitled to the order:—first, because the condi-

(a) As to the right of a defendant to move in such a case, without a cross bill, see *Aion*, 2 Dick. 778; *Micklethwait v. Moore*, 3 Meriv. 292; *Davers v. Davers*, 2 P. W. 410; *Pickering v. Rigby*, 18 Ves. 484; *Wiley v. Pistor*, 7 Ves. 411; *Princess of Wales v. Lord Liverpool*, 1 Swanst. 114.

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 1823.—Head v. Head.
 

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tions of sale expressed that the deposit was to be paid to the plaintiff, for his own use—second, because the \*possession of the estate by the plaintiff, was occasioned by the delay of the defendant, and his unwillingness to perform his contract.

The VICE-CHANCELLOR :—The first question is, whether the defendant can make such a motion. Though a defendant cannot primarily move for any order for his security, because he is not a party seeking the aid of the court ; yet, if, at the time of continuing the injunction, he had brought forward this claim as to the deposit, and it had appeared to have been just, the court would have enforced it ; not in the nature of relief to him, but as a condition annexed to the relief given to the plaintiff. And although the defendant has neglected the convenient opportunity for the application, yet I think it still open to him, and that I may consider it in principle as a motion to dissolve the injunction, unless the plaintiff pay the money into court.

Upon the merits, it appears to me, that the question is, whether it is the fault of the plaintiff, and against the will of the defendant, that the plaintiff retained both the deposit and the estate. And being of opinion, upon the facts appearing by affidavit and answer, that the plaintiff, at the time of the bill filed, was able and willing to make a good title to the estate sold, and that the defendant improperly refused to complete the contract ; I consider that it is the fault of the defendant, and not of the plaintiff, that the plaintiff retains both the deposit and the estate, and therefore I must refuse the motion.

[\*150]

\*HEAD V. HEAD.

1823, 17th January : 22d February.—*Evidence.—Legitimacy.*

A child born of a married woman, whose husband is within the four seas, is always to be presumed to be legitimate ; unless there is evidence affording irresistible presumption that sexual intercourse did not take place between them, at any time, when in the course of nature, the husband might have been the father of the child.

THIS was a motion for the new trial of an issue directed by the Vice-Chancellor, upon the question : whether the plaintiff was the legitimate child of one William Head.

The issue was tried at the sittings after Michaelmas term, 1822, before Mr. Justice Burrough ; when the jury found a verdict for the plaintiff. The new trial was moved for, upon the ground of a misdirection by the learned judge, who had laid down the law to the jury in the language of Lord Ellenborough, C. J., in the case of *The King v. Luffe*, (a) the effect of which was, that where a child is born of a married woman, the husband is to be presumed to be the father, unless there be evidence to show the absolute physical impossibility of that fact.

(a) 8 East, 193.

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When the case was first mentioned, it was ordered to stand over, in order that the court might be furnished with the notes of the learned judge before whom the issue had been tried.

In the first argument (b) in favor of the motion, the *Banbury Peerage* case was mentioned by the court ; and, as that case was not reported, though mentioned in some of the text books, the motion was ordered to stand over, in order that an authentic copy of the opinions of the judges in that case might be obtained ; (c) as it seemed to the court that they must govern its decision in the present case. After these were obtained, the motion was brought forward again.

\*Mr. Serjeant *Lens*, and Mr. *Bell*, in support of the motion, admitted [\*151] the rule to be, that there must be irresistible presumptive evidence of non-access, where the husband and wife were found in the same place at a time, when, if sexual intercourse had taken place, the husband might, in the course of nature, have been the father of the child. But they contended, that in this case, the jury had given their verdict under the influence of the judge's direction, that there must be a moral impossibility that the husband could be the father of the child. If the judge had merely stated that the case was one which required overwhelming evidence as to the presumption of non-access, there would have been no ground for complaint. All that was wanted was, that the case should go before a jury, unfettered by any direction or statement of the rule of law, which should make them think it indispensable, in order to establish the illegitimacy, that the actual impossibility of the husband being the father must be proved. Admitting that the evidence must be such, as to raise an irresistible presumption that the husband was not the father, a jury had not yet had an opportunity of considering the case under that impression as to the rule of law.

Mr. *Heald*, appeared for the purpose of opposing the motion.

The VICE-CHANCELLOR :—The ancient policy of the law of England remains unaltered. A child born of a married woman, is to be presumed to be the child of the husband, unless there is evidence, which excludes all doubt, that the husband could not be the father. But, in modern times, the rule of evidence has varied. Formerly, it was considered, that \*all doubt [\*152] could not be excluded, unless the husband were *extra quatuor maria*.

But, as it is obvious that all doubt may be excluded from other circumstances, although the husband be within the four seas, the modern practice permits the introduction of every species of legal evidence tending to the same conclusion. But still the evidence must be of a character to exclude all doubt : and when the judges, in the *Banbury case*, spoke of satisfactory evidence upon this subject, they must be understood to have meant such evidence as would be satisfactory, having regard to the special nature of the subject. It is to be de-

(b) At the first argument Mr. Serjeant *Lens* quoted the case of *Goodright dem. Thompson v. Saul*, 4 T. R. 356.

(c) See post. p. 153, 4, 5, 6, 7, 8, 9.

1822.—Head v. Head

duced, as a corollary from the opinions of the learned judges in that case, that, whenever a husband and wife are proved to have been together, at a time when, in the order of nature, the husband might have been the father of an after-born child, if sexual intercourse did then take place between them, such sexual intercourse was, *prima facie*, to be presumed; [1] and that it was incumbent upon those who disputed the legitimacy of the afterborn child, to disprove the fact of sexual intercourse having taking place, by evidence of circumstances which afford irresistible presumption that it could not have taken place; and not, by mere evidence of circumstances, which might afford a balance of probabilities against the fact that sexual intercourse did take place. In the present case, the husband and wife are proved to have been together at a time, when, if sexual intercourse did take place between them, the husband might, in the order of nature, have been the father of the plaintiff; and the circumstances given in evidence on the part of the defendant, not only do not afford irresistible presumption that sexual intercourse did not actually take place, but leave the balance of probabilities in favor of the fact that sexual intercourse did take place between them. It is true, that [\*153] \*the rule laid down by the learned judge who tried the issue, from the case of *The King v. Luffe*, cannot be reconciled with the opinions of all the judges in the *Banbury case*, and is not, therefore, to be considered as the rule now applicable to the subject: yet, as it is my opinion that if upon any direction from that learned judge, the jury had found a different verdict, it would have been my duty to have ordered a new trial, it cannot serve either the purposes of justice, or the interest of the parties, to submit this case, a second time, to a jury, in order to give to the defendant the chance of their coming to a verdict, which, if they did find it, I could not adopt.

Motion refused.[2]

This motion was heard on appeal before the Lord Chancellor, and on the 24th April 1823, his lordship confirmed the decision of the Vice-Chancellor. [3]

#### BANBURY PEERAGE CASE.

1811, 2d, 13th and 30th May, and 4th July.

THE following are the questions put to the judges by the house of lords in the case of the Banbury claim of peerage, and the answers returned thereto. (a)

1st. "Whether the presumption of legitimacy, arising from the birth of a child

(a) These questions and answers are extracted from the printed report of the proceedings in this case, belonging to Lincoln's Inn Library.

[1] *Bury v. Philpot*, 2 Mylne & Keene, 319. *Cross v. Cross*, 3 Paige, 139.

[2] It is nevertheless competent for the court to award a new trial in cases of this description. This is however evidently, a matter of sound discretion. *Gibbs v. Hooper*, 2 Mylne & Keene, 353.

[3] 1 Turner, 138.

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 1811.—Banbury Peerage Case.
 

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during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other during the period in which a child could be begotten \*and born in the course of nature, can be re- [\*154] butted by any circumstances inducing a contrary presumption ?”

The Lord Chief Justice of the court of common pleas having conferred with his brethren, stated, that they were unanimously of opinion,

“ That the presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other, during the period in which a child could be begotten and born in the course of nature, may be rebutted by circumstances inducing a contrary presumption ;” and gave his reasons.

2d. “ Whether the fact of the birth of a child from a woman united to a man by lawful wedlock, be always, or be not always, by the law of England, *prima facie* evidence that such a child is legitimate ; and whether in every case in which there is *prima facie* evidence of any right existing in any person, the *onus probandi* be always, or be not always, upon the person or party calling such right in question. Whether such *prima facie* evidence of legitimacy may always, or may not always, be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and wife, as by the laws of nature is necessary in order for the man to be, in fact, the father of the child ; whether the physical fact of impotency, or of non-access, or of non-generating access (as the case may be) may always be lawfully proved, and can only be lawfully proved, by means of such legal evidence as is strictly admissible in every other case in which it is necessary, by the laws of England, that a physical fact be proved ?”

\*The Lord Chief Justice of the common pleas delivered the unani- [\*155] mous opinion of the judges upon this question as follows :

“ That the fact of the birth of a child from a woman united to a man by lawful wedlock, is, generally, by the law of England, *prima facie* evidence that such child is legitimate.

“ That in every case in which there is *prima facie* evidence of any right existing in any person, the *onus probandi* is always upon the person or party calling such right in question.

“ That such *prima facie* evidence of legitimacy may always be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and the wife, as, by the laws of nature, is necessary in order for the man to be, in fact, the father of the child.

“ That the physical fact of impotency, or of non-access, or of non-generating access, as the case may be, may always be lawfully proved by means of such legal evidence as is strictly admissible in every other case in which it is necessary, by the law of England, that a physical fact be proved.”

3d. “ Whether evidence may be received and acted upon to bastardize a child born in wedlock, after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of such child,



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 1811.—Banbury Poorage Case.
 

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the husband not being impotent, except such proof as goes to negative the fact of generating access?"

[\*156] \*4th. "Whether such proof must not be regulated by the same principles as are applicable to the legal establishment of any other fact?"

In answer to the said questions, the Lord Chief Justice of the common pleas delivered the unanimous opinion of the judges on the same, as follows:—

"That, after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of a child (by which we understand proof of sexual intercourse between them) no evidence can be received except it tend to falsify the proof that such intercourse had taken place."

[\*157] \*7th. "Whether, in every case where a child is born in lawful wedlock, sexual intercourse is not by law presumed to have taken place, after the marriage between the husband and wife (the husband not being proved to be separated from her by sentence of divorce) until the contrary is proved by evidence sufficient to establish the fact of such non-access, as negatives such presumption of sexual intercourse within the period, when, according to the laws of nature, he might be the father of such child?"

8th. "Whether the legitimacy of a child born in lawful wedlock (the husband not being proved to be separated from his wife, by sentence of divorce,) can be legally resisted by the proof of any other facts or circumstances than such as are sufficient to establish the fact of non-access, during the period within which the husband, by the laws of nature, might be the father of such a child; and whether any other question but such non-access can legally be left to a jury upon any trial, in courts of law, to repel the presumption of the legitimacy of a child so circumstanced?"

[\*158] \*Then the judges being agreed in their opinion, in answer to the said questions propounded to them, the Lord Chief Justice of the court of common pleas delivered their unanimous opinion upon the same, as follows:—

"That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse, did not take place at any time, when by such intercourse, the husband could, according to the laws of nature be the father of such child.

"That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and wife, at

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1811.—*Banbury Peerage Case*.

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any time, when, by such intercourse, the husband could, by the laws of nature, be the father of such child. Where the legitimacy of a child in such a case, is disputed on the ground that the husband was not the father of such child, the question to be left to the jury is, whether the husband was the father of such child? and the evidence to prove that he was not the father, must be of such facts and circumstances as are sufficient to prove, to the satisfaction of a jury, that no sexual intercourse took place between the husband and wife at any \*time, when, by such intercourse, the husband could, by the [\*159] laws of nature, be the father of such child."

"The non-existence of sexual intercourse is generally expressed by the words 'non-access of the husband to the wife;' and we understand those expressions as applied to the present question, as meaning the same thing, because in one sense of the word 'access,' the husband may be said to have access to his wife, being in the same place or the same house; and yet, under such circumstances, as instead of proving, tend to disprove, that any sexual intercourse took place between them." [1]

[1] *Cross v. Cross*, 3 Paige, 139.

END OF PART I.

# CASES IN CHANCERY

BEFORE

## THE VICE-CHANCELLOR.

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[\*161]

\*JACKSON v. HAWORTH.

1823, 21st January.—*Practice.—Baron and feme.*

Husband and wife being defendants, the latter, after obtaining an order to answer separately, is entitled to all the orders for time to answer, and is not bound by any previous order obtained by her husband for that purpose on behalf of himself and her.

JOHN HAWORTH and Sarah his wife were the defendants in this cause. John Haworth entered an appearance for himself and his wife; and, early in Michaelmas term last, obtained the common order for six weeks time for himself and his wife to answer, as in a country cause.

Afterwards an order was obtained, on behalf of the wife, as of course, that she might have leave to answer separately; it being alleged that she and her husband lived separate from each other, and the property in question in this cause was vested in him in her right.

On the 13th January 1823, Mrs. Haworth, who lived at Wanstead, in Essex, obtained, as of course, the usual order for a month's time to answer, as in a town cause.

[\*162] \*The court was now moved, on behalf of the plaintiff, to discharge this last order, for irregularity.

Mr. Treslove for the motion:—Where a person institutes a suit against a husband and wife, he cannot serve the wife separately. Where an order for time is obtained by husband and wife, how can the plaintiff know whether it is obtained by the act of the husband, or of the wife? If the wife had notice of the suit at the time when the first order for time on behalf of herself and her husband was obtained, it is quite unreasonable that she should be allowed, as of course, to obtain a new order for time, after having the advantage of the first. If she can be at all entitled to such new order, it must be on making out a special case to the court, and showing some sufficient reason for such an indulgence. An order of course for that purpose cannot be regular.

The VICE-CHANCELLOR:—No authority is advanced in support of this appli-

1823.—*Garey v. Whittingham.*

cation. The wife became a substantial party to the suit, only from the time of the order that she should answer separately.[1] From that time I think she was entitled to the same time as the other defendants, and the register (Mr. Walker) tells me he is of the same opinion.

Motion refused, with costs.

\*GAREY V. WHITTINGHAM.

[\*163]

1823, 23d January.—*Practice.—Baron and feme.*

Husband and wife being defendants, the husband, without obtaining an order for the wife to answer separately, puts in a separate answer, stating that his wife did not live with him, and that he had no influence over her; and being taken into custody on an attachment, for want of his wife's answer, the court ordered him to be discharged, and the wife to answer separately, and indemnify her husband in respect of costs.

Where husband and wife are defendants, and the husband is abroad, the plaintiff may obtain an order that the wife shall answer separately.

*Quere*, Whether either the plaintiff or the husband can obtain this order, without notice to the wife; and whether the husband can put in a separate answer before any such order is made.

In this cause Whittingham and his wife were defendants. The husband put in a separate answer, in which he stated that his wife did not live with him, and that he had no influence over her. The wife put in no answer; and an attachment was sued out against the husband for want of his wife's answer, under which he was taken into custody.

The court was now moved, on his behalf, to discharge this attachment and that the plaintiff might have leave to sue out an attachment against the wife.

Mr. *Bell*, for the motion, read that passage in the answer, which stated that the husband did not live with the wife, and had no influence over her.

The VICE-CHANCELLOR:—A wife can never answer separately, unless an order is obtained for that purpose. A husband may obtain that order where he cannot influence his wife to answer; and where the husband is abroad, and not amenable to the jurisdiction, the plaintiff may obtain the order. But I doubt whether, in either case, notice of the application ought not to be given to the wife. I likewise doubt whether the husband can answer separately, before there is an order that the wife shall put in a separate answer. The practice, however, seems to be to receive his answer. And yet, if it were not a case in which an order might be obtained for the wife \*to [\*164] answer separately, she must answer jointly; and then his answer must be taken off the file, in order that she may join in it. His separate answer will be put in only where the wife will not, in fact, join; and the receiving of

[1] "Generally a married woman cannot answer separately, when her husband is joined, or ought to be joined, as a defendant in the suit, without an order of court for that purpose, founded upon special circumstances." *Story's Eq. Plead.* 72; see next case.

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 1823.—*Bushell v. Bushell.*


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his answer before he obtains the order upon his wife, does, in truth, forward the proceedings.

I shall order the husband, in the present case, to be discharged, and the wife to answer separately, and to indemnify the husband in respect of costs.

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**BUSHELL v. BUSHELL.**

1823, 7th February.—*Practice.—Baron and feme.*

Husband and wife being defendants, and the husband being abroad, the wife alone was served with the subpoena, and an attachment was directed against her for want of appearance.

In this case, Bagshaw and Nancy his wife, were defendants. Bagshaw was abroad; but his wife resided within the jurisdiction of the court. The subpoena against her and her husband was served upon her; but no appearance was entered.

The court was now moved, on behalf of the plaintiff, that an attachment might issue against the wife for want of an appearance. It did not appear that notice of the motion was served on the wife.

Mr. Wingfield, for the motion, relied on *Bell v. Hyde*,<sup>(a)</sup> and *Barry v. Cane*.<sup>(b)</sup>

THE VICE-CHANCELLOR:—I doubt whether there ought not to be notice of motion. I shall, however, order the attachment, without prejudice to an application to discharge it, the plaintiff undertaking not to execute it, without the leave of the court.

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[\*165]

**\*WORTHINGTON v. EVANS.**

1823, 28th January.—*Legacy.—Condition.*

Where a legacy was given on condition of the legatee marrying with the consent in writing of the executors, and he afterwards married with their approbation, but they did not express their consent in the manner required by the will: Held, that the legatee was entitled to his legacy, and that the consent of one of the executors who had not acted was not necessary.

THE bill in this cause prayed for a declaration, that the plaintiff had become entitled to certain personal property bequeathed to him by his father, upon condition that he married with the consent in writing of the executors.

Thomas Worthington, the father, by his will made in November 1805, after giving 3,000*l.* to be divided by his executors equally among all the children of his three daughters, gave to his executors, David Evans and Edward Heyward, their executors, administrators, and assigns, his household goods and other personal estate therein mentioned, and also all the residue of his

(a) *Pro. Cha.* 328.

(b) 3 *Madd.* 472.

1823.—*Worthington v. Evans.*

personal estate after payment of his debts, upon trust, for the use and benefit of his son, (the plaintiff,) to be paid and transferred to him, as soon as conveniently might be after his marriage, with the interest and produce to accrue and arise in the meantime, upon condition, nevertheless, that such marriage should be with the consent of his, the testator's, trustees, or the survivor of them, first had and obtained in writing, under his or their hand or hands. And, after directing his trustees to cause an inventory and appraisement to be made, and authorizing them to permit the plaintiff to continue in possession of a certain farm till his marriage, but if the plaintiff should marry without the consent of the trustees, or the survivor of them, first had and obtained in writing, as before mentioned, or in case he should, with or without their consent, \*marry J. P. or any of the daughters of T. P. then [\*166] that the plaintiff should not be entitled to any part of the household goods, property or effects before bequeathed for his benefit; and he directed the trustees, or the survivor of them, to pay the sum arising from the appraisement, and all the residue of his personal property, among all the children of his three daughters, in equal shares; and appointed David Evans and Edward Heyward, executors of his will.

The testator died in 1806. David Evans alone proved the will, and alone acted in the execution of the trusts; the other executor and trustee, Mr. Heyward, refused to act, in any manner, in the trusts of the will. Soon after the testator's death, the plaintiff formed an attachment to a lady, whom he afterwards married, and who was not of the family prohibited by the testator. This attachment was formed, and a treaty of marriage entered into, with the approbation of Mr. Evans, the acting executor and trustee. A short time before the marriage, the plaintiff applied for the consent both of Evans and Heyward; and the solicitor of the former, prepared an instrument, in the form of a deed-poll, to be executed by both the executors, reciting the clause in the will, and the intended marriage, and expressing a formal consent to it.

This instrument was duly executed by Mr. Evans; but Mr. Heyward, though he expressed his perfect consent to the marriage, declined to execute the instrument, least he should thereby be considered as taking upon himself the trusts of the will. On the day preceding the one which was fixed for the marriage, the plaintiff wrote the following letter to Mr. Evans:—"Dear sir, fearful it should have slipped your memory, I have taken the \*li- [\*167] berty of reminding you, that it is still my intention to be married to-morrow, when I expect to see you here, and call on Mr. Heyward on your road, as he has promised me at as early an hour as you may think proper."

On the same day, Mr. Evans wrote in reply to the plaintiff, as follows:—"Dear sir, you should have told me, when I had the pleasure of seeing you here, that it was your intention to have been married to-morrow; but you did not give me a hint that it was your intention so soon. If you had, I should have been better prepared. And I hope it will make no material difference, if the ceremony is delayed a day longer. I will, however, be as early to-

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 1823.—*Worthington v. Evans.*


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morrow morning as I possibly can at Mr. Heyward's, and bring with me the proper consent, done right, to your house, which will be some time doing.

"N. B. I should have sent your servant home sooner, but I waited for Mr. Thomas, who was from home. But you know you have my consent to marry your cousin Sarah Worthington."

Mr. Thomas was the solicitor employed by Mr. Evans to prepare the instrument. Early in the morning of the day on which these letters were written, Mr. Evans called on Mr. Heyward, and produced to him the instrument in question, which Heyward read, but which he declined to sign, on the ground that it might be considered as done in execution of the trusts of the will, in which he refused to act. Mr. Evans then signed the instrument himself, and proceeded to the house of the plaintiff, where he found that the marriage had taken place, in the morning, some hours before his arrival, and before the time when he signed the instrument.

[\*168] \*Evans, in his answer, admitted that the marriage was, in fact, had with his consent; and stated, that he would have signed the instrument in question before the time when he did sign it, if he had thought that the marriage would have taken place so soon.

Heyward's answer stated, that, upon having the instrument read over, he conceived a doubt whether he could safely execute any instrument relative to the trusts of the will, without involving himself in the execution of them, and that he wished to consul this attorney upon the subject, and, for that reason, declined to sign the paper at that time. But he added that, in all other respects, except in the apprehension that by signing he might implicate himself in the trusts of the will he most fully approved of the paper writing; and that he would, had he considered himself as an acting trustee, have signed that paper, or any other, which might have been thought necessary to testify his consent to the marriage.

The other defendants were the children of the testator's sisters, who claimed under the gift over of the property made by the will, in case the plaintiff married without the consent of the trustees.

The cause now came on to be heard.

Mr. Bell and Mr. Roupell, for the plaintiff:—

I. It is settled that cases of this kind are to receive a favorable construction as to the performance of the condition; and that a consent substantially given, though in some respect deficient in form, will be considered a sufficient compliance to prevent a forfeiture. *D'Aguilar v. Drinkwater*,<sup>(a)</sup> *Daley v. Desbouverie*.<sup>(b)</sup>

\*169] \*II. The consent which was given is sufficient, and is more perfect than in many cases where the court has held conditions of this kind to have been complied with. In *Daley v. Desbouverie*, the words "we shall be obliged to consent" if certain acts were done, were held by Lord Hardwicke, to amount to an actual present consent. In *D'Aguilar v. Drinkwater*, the ex-

(a) 2 V. & B. 225.

(b) 2 Atk. 261.

1823.—*Worthington v. Evans.*

pression "that the party would never stand in the way of any arrangement which the other executors might approve," was construed to be a valid consent. *Pollock v. Croft*, (c) *Merry v. Ryves*, (d) *Mesgrett v. Mesgrett*, (e) *Lord Strange v. Smith*, (f) *Burleton v. Humphries*, (g) are all cases to the same effect. It is settled, by these authorities, that a consent substantially given is sufficient to satisfy a clause of the kind now in question; and that the conduct of the trustee may be such as to amount to consent. In the present case, all was done that the testator could have wished. Even Heyward did not refuse his consent in writing, but only wished to consult his attorney, because he was afraid it might be considered as taking upon himself the execution of the trusts of the will, which he declined.

III. The consent is not required from a person not acting as executor or trustee, but is annexed entirely to the office; therefore, the consent of Heyward, who refused to act in the trusts of the will, is quite immaterial. In every clause of the will, where the consent is mentioned, it is not the consent of the persons *by name* which is required, but the consent of "his said trustees." Why then is it necessary to have the consent of one who refuses to be a trustee? The testator has made the act of consent a part of the trusts of his will. \*How could a trustee transfer the property to the plaintiff [\*170] upon his marriage with consent, according to the trusts of the will, when he actually renounced the will? In such a case it could not be required. His renouncing made his consent unnecessary. The only trustee who acted gave his consent in sufficient terms; for, in his letter of the 3d November, he says. "I shall be as early to-morrow as I possibly can with Mr. Heyward, and bring the proper consent with me in writing;" and afterwards he adds, "You know you have my consent to marry your cousin, Sarah Worthington." These expressions are an actual consent in writing. But even if the consent is to be considered as a matter of personal discretion in the trustees, independent of their office, the circumstance of one of the trustees never having acted, brings the case within what is said by Lord Eldon in *Clarke v. Parker*. (h) "It is said, Parker never acted; and if that were so, I should have been strongly disposed to say there is, though no execution of a previous settlement, such a consent on the part of the two acting trustees as would be sufficient to satisfy the clause in the will."

IV. This is a case of personal estate, and is therefore one in which the clause is not to be construed so strictly as if it were realty. *Long v. Dennis*. (i)

Mr. Heald, Mr. Twiss, and Mr. Robert Roupell, for defendants:—

I. As to the authorities which have been cited, they do not sufficiently apply to the present case, and some of them are met by *Lloyd v. Branton*. (k)

\*II. Even if it were admitted that the consent of Evans alone [\*171] was required, that consent was not sufficiently given. The postscript

(c) 1 Meriv. 181.

(d) 1 Eden, 1.

(e) 2 Vern. 580.

(f) Amb. 263.

(g) Amb. 256.

(h) 19 Ves. 16.

(i) 4 Burr. 2054.

(k) 3 Meriv. 108.



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 1823.—Worthington v. Evans.
 

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to his letter shows that he did not consider that letter as giving his consent. The words, "I should have been better prepared," mean that he would have taken into consideration all the circumstances of the lady's fortune, and would have consulted the other trustee. It shows that the act of consent was only inchoate and incomplete. It is laid down in *Reynish v. Martin*,<sup>(l)</sup> that a consent given subsequently to the marriage is not sufficient.

III. As to the argument that the power to consent is annexed merely to the office of trustee, the opinion expressed by the late master of the rolls in *Knight v. Cameron*,<sup>(m)</sup> seems against that construction. And, in a recent case before the Lord Chancellor, where a question arose as to leases which were required to be executed by guardians, the Lord Chancellor expressed an opinion that both must concur, and that the act of one was not sufficient. It must be admitted that there is no distinction, in the expression of the will, between the authority given to the trustees to consent to the marriage, and the other authorities given to them by the will; except only that the consent is required to be in writing. But there is no authority for the doctrine that, where a testator reposes a discretion in trustees as to a marriage, the consent of one trustee shall be sufficient. The testator not requiring the consent of the trustees by name, but merely by the description of his trustees, is not sufficient to show that the authority was annexed exclusively to their office. The testator was reposing a confidence in these trustees, as being persons [\*172] with whose judgment he was satisfied. If \*Evans had died and

Heyward had become the survivor, his consent would have become indispensably necessary, not from the language of the will, but from the necessity of the case. The testator, by using the word "survivor," favors the construction, that the authority was not annexed merely to the office; for, if he had meant it to be exercised by one only, in case he alone took upon himself the office, he never would have used the word "survivor," which has the effect of giving it to one who may not have assumed the office at all.

IV. The letter, which is relied on in this case as giving the consent, is not such as in the case of *Daley v. Desbouverie*, which made the court say that it had the effect of inducing the parties to marry, and that it would, therefore, be a fraud to allow the party afterwards to depart from the effect of such a letter.

The VICE-CHANCELLOR:—I am prepared to hold, according to the intimation of Lord Eldon's opinion, in *Clarke v. Parker*, that the authority to consent is here annexed to the office of trustee; and like other authorities annexed to that office, vested in the single trustee who acted. The letter written by the acting trustee the day before the marriage, must be considered as a sufficient consent in writing. And if there had not been such a letter, inasmuch as the formal consent in writing would have been executed by him but for the accidental delay occasioned by the other trustee, and not from any change of

(l) 3 Atk. 330.

(m) 14 Ves. 392.

1823.—Withy v. Cottle.

purpose, the court would have considered his consent to have been substantially given, according to the will ; because he had expressed his full approbation of the marriage, and only did not sign it, for a reason personal to himself.

\*I do not, however, decide the case ; because the fact that the other [\*173] trustee named had never acted and had refused to sign only for the reason stated, though satisfactorily proved, is not sufficiently put in issue by the bill ; and I must send it to the master to inquire into these facts.

The master reported, that the late defendant E. Heyward never acted in the trusts of the will ; and that he refused to sign the written consent, tendered to him in the morning before the marriage was celebrated, because he imagined, that, by signing such consent, he should be committing himself to act as trustee, and that he, as well as the acting trustee, approved of the marriage.

Upon this report, his honor made a decree in favor of the plaintiffs, saying, that he did so for the reasons which he had stated when the cause was heard.[1]

## \*WITHY v. COTTLE.

[\*174]

1822, 2d November ; 1823, 31st January.—*Specific Performance.*

Where damages in an action at law for breach of a contract to sell a chattel, would be an insufficient remedy for the purchaser, although a sufficient remedy for the vendor, a demurrer to a bill by the vendor for a specific performance was overruled, because the remedy in this court must be mutual for purchaser and vendor.

Where the answer to a bill for a specific performance raises any other objection to the performance of the contract besides defects in the title, on a motion for a reference of the title to the master, after the answer has come in : *semble*, that the court will not examine whether the other objections be frivolous or not, because that is matter to be decided at the hearing of the cause.

THIS was a bill filed by the vendor of an annuity, payable out of the dividends of stock, standing in the name of the accountant-general of this court, for the specific performance of an agreement for the purchase of this annuity.

The defendant demurred to the bill.

Mr. Hart and Mr. Stuart for the demurrer :—

I. It is settled, that this court will not entertain a bill for the specific performance of an agreement for the sale or transfer of stock, *Cudd v. Rutter*, (a) *Nutbrown v. Thornton*. (b) In the present case, the contract is for the sale of the dividends of stock ; and it must, therefore, be governed by the same principle which guides the court in refusing specific performance of an agreement for the sale of the stock itself.

II. This is not a case within any of the exceptions to the general rule, that the court will not entertain a bill for the specific performance of a contract for the purchase of a chattel, *Buxton v. Lister*, (c) *Taylor v. Neville*. (d) All the

(a) 1 P. W. 570.

(b) 10 Ves. 159.

(c) 3 Atk. 383.

(d) 3 Atk. 384, mentioned in *Buxton v. Lister*.

[1] Vide 1 Story's Eq. 289. *Le Jeune v. Budd*, 6 Sim. 441. Distinction in this respect, between a will, and a settlement, *Duffield v. Elwes*, post, 239.

1823.—Withy v. Cottle.

cases of exception from the general rule, proceed on the principle, that damages to be recovered in an action at law, would not, owing to some [\*173] particular circumstance in the case, afford an adequate remedy. \*In *Wright v. Bell*, (e) specific performance of a contract to purchase a debt, was decreed by the court of exchequer, on the ground that the agreement was not in such a shape as could enable the party to recover damages in an action at law. In the present case, there can be no doubt that, in an action at law by the vendor, he could obtain a sufficient compensation in the shape of damages. Here there is nothing in the nature of the property or in the nature of the agreement, to bring the case within the exceptions to the general rule, that an action at law is a sufficient remedy for the breach of such a contract.

Mr. *Sugden* and Mr. *Seton* for the bill, were stopped by the court.

The VICE-CHANCELLOR :—There can be no doubt that the defendant, who is the purchaser of this annuity, might have filed a bill for the specific performance of the agreement for sale to him ; because a court of law could not give him the subject of his contract, and the remedy here must be mutual for purchaser and vendor. [1]

Demurrer overruled.

The defendant afterwards put in his answer, insisting that the plaintiff could not make a good title to the annuity, and objecting that, as the plaintiff had not made out a good title by the time fixed in the condition of sale for the completion of the contract, the defendant could not now be called upon for a specific performance.

[\*176] \*This answer being filed, the plaintiff moved for a reference to the master to inquire, and state to the court whether the plaintiff could make a good title to the annuity, and at what time he could make such title.

Mr. *Sugden* and Mr. *Seton*, for the motion :—The only other objection raised by the defendant, besides the question of title, is the non-performance of the contract within the time fixed by the conditions of sale. That objection is quite frivolous. There can be no pretence to say that time is of the essence of the contract, in such a case as this. That objection being of no avail, nothing but the question of title remains, and the case comes within the principle of those in which the court, at this stage of the cause, directs a reference to the master to report upon the title. The case comes exactly within the principle of *Boehm v. Wood*, (f) which decided, that the court will grant a reference as to the title, where the only other objection raised by the answer is of a nature that cannot be sustained. In *Boehm v. Wood*, as in this case, the only other objection raised was, that time was of the essence of the contract ; and the court, on looking into the answer, found that the case was

(e) 5 Price, 325, and S. C. Daniell's Exch. Reports, 95.

(f) 1 Ja. & Wa. 419.

[1] Vide *Dolores v. Rothschild*, post, 590. *Adderly v. Dixon*, post, 607.

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 1823.—*Withy v. Cottle.*


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not one in which that objection could be sustained, and therefore directed a reference.

Mr. *Hart* and Mr. *Stuart* opposed the motion :—

I. The court cannot, at this stage of the cause, enter into the consideration of any objection raised by the answer besides the question of title. Whatever may be said of the decision in *Boehm v. Wood*, it is contradicted by all the preceding cases in which this question \*has been considered. [\*177] In *Blyth v. Elmhirst*,(g) Lord Eldon himself lays it down as the settled doctrine of the court, that, if the answer, upon reasons solid or frivolous, insists that the agreement ought not to be executed, the court cannot direct a reference as to the title on an interlocutory application, unless by consent of the defendant. This is the true doctrine, recognized by the principle of all the cases on this subject. The contrary doctrine cannot be maintained, because it supposes that the court, by merely looking into the answer, can decide upon the force of an objection which may be materially affected by evidence to be taken in the cause. Till the hearing, the court has not the proper means of forming an opinion as to whether the objection is or is not frivolous.

II. In this case, the objection that time is of the essence of the contract, is certainly not frivolous, the subject matter of the contract being a life annuity, the value of which must necessarily be diminished by effluxion of time. It is therefore precisely the case in which time must be of the essence of the contract.

The VICE CHANCELLOR :—I feel myself extremely embarrassed by the contradictory authorities which have been cited on this motion. There is great difficulty in the doctrine, that the court can, upon motion, decide on the merits of an objection raised by the answer.[1] But as there appears to be an express authority in support of it, I would wish this motion to be made before the Lord Chancellor, rather than that I should decide between these conflicting cases.

\*The motion was accordingly made before the Lord Chancellor, [\*178] when his lordship, on reading the answer, expressed his opinion, that the objection as to time,[2] being of the essence of the contract, was not frivolous ; and refused the motion, without costs.

In the following case the same question occurred.

(g) 1 V. & B. 1.

[1] Vide *Portman v. Mill*, 2 Russ. 570.

[2] Vide *Hepburn v. Auld*, 5 Cranch, 262. *Brashier v. Gratz*, 5 Wheat, 541. *Benedict v. Lynch*, 1 Johns. Ch. Rep. 370. *Pratt v. Carroll*, 8 Cranch, 471. *Pratt v. Campbell*, 9 Cranch, 456. *Parker v. Frith*, post, 199, n.

1823.—Gordon v. Ball.

## GORDON v. BALL.

1823, 25th April.—*Specific performance.*

*Señble*, That the court will not, on motion, decide upon the validity of any other objection, besides defect of title, which may be raised by the answer to a bill for specific performance, the consideration of any other objection being matter to be reserved till the hearing of the cause.

THIS was a bill filed by the vendor, for the specific performance of a contract for the purchase of an estate. The defendant put in his answer, insisting, that the plaintiff could not make a good title to the estate, and that he ought not to be called upon for a specific performance, because there was a right of way across the estate, the existence of which had been concealed from him, and which, if he had known of it, would have deterred him from purchasing.

The plaintiff now moved, that it might be referred to the master, to inquire whether the plaintiff could make a good title to the estate, and at what time.

Mr. Hart for the motion, referred to *Boehm v. Wood*,<sup>(a)</sup> and *Withy v. Cottage*,<sup>(b)</sup> in which last case the Lord Chancellor, though he refused the motion for a reference as to the title, confirmed the doctrine laid down in *Boehm v. Wood*, that when any other objection to the performance of the contract, besides defect of title, is raised by the answer, the court will consider [\*179] whether that other objection be substantial or not. In the present case, the objection is by no means substantial. The footpath in question is a subject for compensation, and for compensation to a very trifling amount.

Mr. Roupell opposed the motion, and relied on the established rule, that no reference of the title can be directed on motion, where any other objection is raised by the answer.

The VICE CHANCELLOR :—The admitted rule is, that if any other objection besides the question of title is raised by the answer, the order of reference as to the title cannot be made upon motion. It is stated that this rule admits of exceptions, where the other objection is unsubstantial. But the consideration, whether an objection is to be considered unsubstantial, involves great difficulty. In order to determine whether the other objection be or not unsubstantial, it must, for the purpose of this motion, be taken to be found in fact; and being to be considered by the court, it is difficult to say that it is not to be open to the argument of counsel. If the objection is to be considered as unsubstantial whenever the court is of opinion that it cannot be supported, then the whole merit of a cause may come to be argued and to be decided upon motion, instead of decree, and upon an assumed statement which may have no existence in point of fact. If the objection may, in the opinion of the court, be invalid, and yet is not to be considered as unsubstantial, then the case becomes still more embarrassing, and neither the court nor the counsel can know very well how to treat it. Is

the court to say the invalidity of the other objection is too clear for argument, and therefore it is unsubstantial?—Then the \*question of sub-

<sup>(a)</sup> 1 Jac. & Walker, 419.<sup>(b)</sup> The preceding case.

1823.—Trower v. Butts.

stantial or unsubstantial comes to depend upon the constitution of mind of the particular judge.

At the same time it must be admitted, that there may be cases in which the other objection is of such little weight, that there may be reason to consider it as stated for the purpose of delay, and in order to escape an immediate reference as to the title. But this immediate reference being in its nature an extraordinary indulgence to the plaintiff, out of the common course of proceeding, the consideration is, whether it is not better where the defendant states even a frivolous objection (which it is to be remembered must, as to the facts, be always made upon his oath, and as to the law, be sanctioned by the signature of counsel) rather to compel the plaintiffs to adhere to the common course of proceeding, than to encounter the difficulties which must unavoidably arise from a different course.

In this case, however, I am not involved in the difficulties to which I have referred. The defendant says, not merely that there is a footpath, but that he entered into the contract upon an express representation by the plaintiff, that there was no footpath; and this at all events is a substantial objection.

I must therefore refuse the motion, with costs.

\*TROWER v. BUTTS.

[\*181]

1823, 28th January; 1st February.—*Posthumous child.—Legacy.*

Bequest in trust for all the children of the testatrix's nephew R., born in the life-time of the testatrix, includes a child of which the wife of R. was *enroute* at the time of the testatrix's death, though not born for several months afterwards.

THE supplemental bill in this cause, was filed for the purpose of obtaining the opinion of the court, as to whether the defendant, Thomas Nowell Trower who was born a few months after the death of the testatrix, Mary Smith, was or was not entitled to claim under her will.

Mary Smith, by her will, dated the 2d of April 1821, bequeathed to trustees the sum of 2,000*l.* upon trust to invest the same in the purchase of stock, and to pay the dividends thereof, to Maria Heathcote for life, and, after her decease, to stand possessed of the capital, in trust, for all the children of Robert Trower, the nephew of the testatrix, born in her life-time, equally to be divided between them, share and share alike, to be paid or transferred to them respectively, on attaining the age of twenty-one years; but in case of the death of any of them in her life-time, or under that age, without leaving lawful issue, then she directed, that the share, as well original as accruing, of each such child so dying, should go to the others or other of such children: Provided always, that in case of the death of any of such last-mentioned children in her life-time, or under the age of twenty-one years, leaving lawful issue, then such issue should be entitled to such share or shares of the trust fund, as their respective

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parents would otherwise have acquired, either originally or by way of accruer, under the trust aforesaid.

The testatrix died in October 1821.—Charlotte, the wife of her [\*182] nephew, Robert Trower, had several children \*born at the time of her death, and was then *enceinte*. In the month of February following, the defendant, Thomas Nowell Trower was born; and the only question argued at the hearing of the cause was, whether Thomas Nowell Trower was entitled, under the will, to a share of the 2,000*l*.

Mr. *Wingfield* and Mr. *Lomax* for the plaintiff, insisted, that the words of the will required, that all the children entitled under it, should be *born* in the life-time of the testatrix, and that, therefore, a child not born for several months after that event, could not be entitled. If the word in the will had been “*living*,” there might have been some ground for the question now raised; but there was no authority strong enough to support a claim against the plain meaning of the words of the will.

Mr. *Skirrow* for the defendant, Thomas Nowell Trower :—In *Whitelock v. Heddon*, (a) the devise was, to any son of John Whitelock, *begotten and born* in lawful matrimony, at the time of John Heddon attaining the age of twenty-one years; and it was held unanimously, in that case, that a son born three months after the time when John Heddon attained twenty-one, was entitled under that devise. In *Doe v. Clarke*, (b) under a devise to such children of B. as shall be living at the time of his decease, it was held, that a posthumous child was entitled. *Gibson v. Gibson*, (c) is also a very strong case, for it was there held, that where a man had given a bond for 900*l*. to be paid to his daughter, in case he should have no son living at the time of his [\*183] decease, \*and died, leaving his wife *enceinte* of a son, the daughter should not be entitled, because the court adopted the maxim of the civil law, “*posthumus pro nato habetur*.” In *Burdet v. Hopegood*, (d) a posthumous son was held entitled to real estate, which was devised, in case the testator should *leave no son at the time of his death*. In *Millar v. Turner*, (e) Lord Hardwicke said, that a posthumous child, in all matters relating to its advantage, must be considered as *in esse*, according to the rule of the civil law. In *Wallis v. Hodson*, (f) the same judge says, that a child *in ventre sa mere*, both by the rules of the common and the civil law, is, to all intents and purposes, a child, as much as if born in the father’s life-time, and that, according to the civil law, a child in the mother’s womb is considered as absolutely born for all purposes for its own benefit. In *Lancashire v. Lancashire*, (g) all the judges of the court of king’s bench, held the same doctrine to be good law. Swinburne, in his *Treatise on Wills*, part 4, sec. 15, pl. 14, says, “howsoever the rule be, that he is not said to die without issue, whose wife is with child at his death, yet that rule ought to take place, when it tendeth to the benefit of the child, not when it tendeth to the prejudice of the child, or only benefit of

(a) 1 Bos. &amp; Pul. 243.

(b) 2 H. Bla. 399.

(c) 2 Freem. 223.

(d) 1 P. W. 486.

(e) 1 Ves. 85.

(f) 2 Atk. 116.

(g) 5 T. R. 49.

1823.—*Hughes v. Evans.*

another." All these cases were reviewed in *Thellusson v. Woodford*.<sup>(h)</sup> Mr. Mansfield, indeed, says, in his argument in that case, that it is only as between parent and child, where there is a moral obligation to provide for the child, that it has been held that a child *in ventre sa mere* is to be considered as born. But in *Doe v. Clarke*, it was not a question as between parent and child.

\*Mr. Wingfield, in reply:—All the cases cited, go no further, [\*184] than that a child *in ventre sa mere*, at the time of the father's death, is to be considered as living at that time. But, to consider such a child as answering the description of a child actually born, is going beyond all the authorities.

The VICE-CHANCELLOR:—It is now fully settled, that a child *in ventre sa mere* is within the intention of a gift to children living at the death of a testator; not because such a child, (and especially in the early stages of conception) can strictly be considered as answering the description of a child living; but because the potential existence of such a child places it plainly within the reason and motive of the gift.

In the case of *Whitlock v. Hodgson*, the words were "sons begotten and born;" and the difference between the expression "living at the death" and "born in the life-time," was not even hinted in the argument or the judgment; and a child *in ventre sa mere* was there held to take. In *Lancashire v. Lancashire*, a child *in ventre sa mere* was considered as born, so as to satisfy the rule of presumption of revocation of a will from subsequent marriage and birth of a child. In that case, one of the judges referred to a maxim of the civil law, that, when the birth of a child happens after the death of a parent, it is, by fiction of law, referred back to his life-time.

Upon the whole, I am of opinion, that inasmuch as it is adopted as a rule of construction, that a child *in ventre sa mere* is within the intention of a gift to children living at the death of a testator, because plainly [\*185] within the reason and motive of the gift; so a child *in ventre sa mere* is to be considered within the intention of a gift to children born in the life-time of a testator, because it is equally within the reason and motive of the gift.[1]

HUGHES v. EVANS. EVANS v. HUGHES.

1823, 1st February.—*Baron and same.*

Where a married woman having a separate interest joins as a co-plaintiff or co-defendant with her husband, instead of suing by her next friend or answering separately, it is to be considered as the suit or defence of the husband alone, and will not prejudice a future claim by the wife.

THE object of the original suit, in which Hughes and his wife were plain-

(h) 4 Ves. 238.

[1] As to a child *in ventre sa mere*, see further *Jenkins v. Freyer*, 4 Paige, 53; *Marselia v. Thalheimer*, 2 Paige, 35.



1823.—Hughes v. Evans.

tiffs, was to establish a claim against the personal estate of William Chambers, for a moiety of the purchase money of an estate which Hughes and Chambers had agreed to purchase on their joint account. The cross bill prayed for a declaration, that Hughes was the sole owner of this estate, and that Chambers' personal estate was not liable for any part of the purchase money.

In November 1817, Hughes and Chambers entered into a partnership as farmers, and occupied a farm as joint-tenants and partners, till the death of the latter. In 1812 they entered into a contract for the purchase of an estate, on their joint account, and were both of them parties to the agreement for the purchase. In March 1814, which was long after the time fixed for the completion of the contract, Hughes paid the whole of the purchase money, and took a conveyance of the whole estate to himself in fee simple but he now insisted, that he did so without intending to take the whole purchase on himself, but merely as an accommodation to Chambers; and that he took the [\*186] conveyance of the \*entirety of the estate to secure the repayment of his moiety of the purchase money.

In August 1814, Chambers died intestate, leaving his brother, George Chambers, and his sister, who was the wife of Hughes, his only next of kin, and George Chambers, his heir at law. Mrs. Hughes and George Chambers became joint administrators of his estate and effects; but the plaintiff, Hughes, stated, that George Chambers alone acted in the administration of the intestate's estate, and that no part of it was possessed by Mrs. Hughes. No part of the purchase money was ever paid to Hughes by George Chambers; nor did it appear that Hughes ever applied to him for any such payment. Many accounts were settled between Hughes and George Chambers, as to the intestate's estate, but it did not appear, though these accounts were settled, that any thing passed between them as to the purchase money. \*

In 1818 George Chambers died, and devised all his real estates to the defendant, Evans, in trust for such purposes as Mrs. Hughes should appoint; and, in default of appointment, in trust for her separate use for her life, with remainder to her right heirs; and he bequeathed all his personal property to the defendant, Evans, absolutely, and appointed him sole executor of his will. Evans proved the will and acted in the trusts. On the death of George Chambers, Hughes sought to throw a moiety of the purchase money as a charge on the personal estate of William Chambers. The original bill charged, that on the partnership farming transactions, a large balance was due to the plaintiff, Hughes, at the time of William Chambers' death; and it prayed ac- [\*187] counts as to those transactions, \*and payment out of George Chambers' estate, in respect of the assets of William Chambers possessed by him.

It appeared that George Chambers, and Hughes, in right of his wife, had treated William Chambers' personal estate as equally divisible between them. Evans, in his answer, and in the cross bill, insisted that, after the contract for the purchase of the estate, a new arrangement was entered into by Hughes and William Chambers, by which Hughes was to take the purchased estate

1823.—*Hughes v. Evans.*

on his own account, and to pay the whole of the purchase money; that William Chambers abandoned the contract with the consent of Hughes; that Hughes paid the purchase money on his own sole account, and executed a mortgage of the estate to raise the purchase money; and that no demand was ever made by Hughes, in respect of the purchase money, during the life-time, either of William or George Chambers. Various acts and declarations by the plaintiff, Hughes, were insisted on by Evans, as evidence of these matters.

The causes now came on to be heard.

*Mr. Hart* and *Mr. E. R. Daniell*, for the plaintiffs in the original cause, insisted, that none of the acts or declarations of Hughes, could be used as evidence against his wife, who was co-plaintiff. In this case, Hughes sued in right of his wife, and, though she was joined as plaintiff, it could only be considered as the bill of the husband. *Pawlet v. Delaval*,<sup>(a)</sup> *Griffith v. Hood*.<sup>(b)</sup>

\**Mr. Bell* and *Mr. Pemberton*, for the defendant in the original [\*186] cause, insisted, that as the wife was a co-plaintiff, and joined in the suit, she thereby made the conduct of Hughes evidence against herself, as well as against him.

The VICE-CHANCELLOR:—It has been insisted, that the declaration and conduct of Hughes as to this purchase, though good evidence against him, are not evidence against his wife. Upon the authority of the cases which have been cited, I am of opinion, that where husband and wife join in a suit as plaintiffs, or answer as co-defendants, it is to be considered as the suit or defence of the husband alone, and that it will not prejudice a future claim by the wife in respect of her separate interest.<sup>(c)</sup> I shall make a decree, intitled in both suits, dismissing the husband's claim for the moiety of the price of the estate, and directing accounts to be taken of the partnership between Hughes and William Chambers, and of the personal estate of William Chambers.

The decree to that effect was made in both the causes.[1]

(a) 2 Ves. 666.

(b) 2 Ves 452.

(c) See *Mole v. Smith*, 1 J. & W. 665.

[1] Vide *Reeve v. Dalby*, 2 Sim. & Stu. 464. Husband and wife ought not to join as co-plaintiffs in a suit relating to the wife's separate property, but the bill ought to be filed by the wife alone, by her next friend; *Sigel v. Phelps*, 7 Sim. 239. Where a bill was filed by husband and wife and their infant children, by the husband as next friend of the children, for the administration of the estate of a testator under whose will the wife was entitled to a separate estate, Lord Langdale, M. R. allowed a demurrer, with reluctance however: "I say with reluctance because I think that suits thus constituted are of familiar occurrence, and I am aware that many decrees have been made in such suits without any inconvenience arising, I think also that in cases in which the husband and wife are not hostile, very little, if any, additional security is obtained for the wife by the appointment of a next friend, the probability being that in such cases, the next friend is appointed by the wife on the recommendation of the husband. If a bill by husband and wife for the wife's separate estate were brought to a hearing, if the separate estate consisted of a specific sum recovered and payable, and capable of being secured to the separate use of the wife, I should think that a decree ought to be made. And in many other cases I apprehend that, with no more attention than the

1823.—Cole v. Fitzgerald.

[\*189]

\*COLE v. FITZGERALD.

1823, 3d February.—*Legacy*.\*

A bequest of household furniture and other household effects in a dwelling-house and premises, comprises all property kept therein either for use or ornament.

JOHN FITZGERALD, by his will made in 1812, gave to Elizabeth Cole his dwelling-house, garden, and premises, at Romsey, for her life, and also all and singular the household furniture and other household effects of and belonging to him in the said dwelling-house and premises at the time of his decease.

The question was, what articles passed to Elizabeth Cole under the bequest of "household furniture and other household effects."

The following articles were found in the dwelling-house and premises, at the testator's death: four fowling pieces, a pair of pistols, lathes and apparatus for turning, models of a cutter and mortar, several paintings in frames, about a hundred volumes of books in general circulation, an organ, a parrot and cage, a grey poney, a cow, a hay-stack, and a considerable stock of wines and liquors.

Mr. Bell, and Mr. Garrett, for the petitioners.

The VICE-CHANCELLOR:—The words, "household furniture and other household effects," will comprise all property in the house and on the premises, intended for use or consumption therein, or for the ornament thereof. Elizabeth Cole is, therefore, entitled to the pistols, to the apparatus for turning, to the models, paintings, organ, parrot, books, and wine and liquors; but not to the poney, cow, or fowling pieces, unless it is proved that they were kept for the

court owes to the suitors, effectual means might be employed to ascertain whether the suit was carried on with the free consent of the wife, and to secure the defendants from any further claims on her part." The demurrer was allowed, but without costs; and leave was given to amend by striking out the name of the husband as plaintiff and as next friend of his infant children, and making him a defendant, and by inserting the name of a next friend to the wife and infant children; *Wake v. Parker*, 2 Keen, 59. Vide *Sweeney v. Hall and others*, Saunde & Scully, 662. *Laird v. Tobin*, 1 Molloy, 543. The misjoinder of parties plaintiff is a ground of demurrer, see *King of Spain and others v. Machado and others*, 4 Russ. 225; *Coffe v. Platell*, 4 Russ. 242; *Glyn v. Soares*, 3 Mylne & Keen, 450. Cases cited supra. A plea showing that one of two plaintiffs has no interest in the matter of the suit, is a good defence to the whole bill. *Makepeace v. Haythorne*, 4 Russ. 244. But it seems that it is too late to make the objection at the hearing; *Sweeney v. Hall and others*, ubi sup.; *Raffety v. King*, 1 Keen, 601; *England v. Downs*, 1 Beav. 96; *Lambert v. Hutchinson*, 1 Beav. 277, in which last cited case Lord Langdale, M. R. says: "There are cases in which notwithstanding a misjoinder of plaintiffs, the court has permitted a decree to be made at the hearing. It has been done when it has appeared that justice would be done to all parties notwithstanding the misjoinder." Where the defendant applies at the hearing to dismiss the bill for the misjoinder and the plaintiff has been allowed to amend, the husband has been required to give security for antecedent costs, costs of the day, and any subsequent costs to be incurred by amendment. *England v. Downs*, and *Sweeney v. Hall*, ubi sup. But in another case security for subsequent costs was refused. *Ring v. Nettles*, 1 Flan. & Kel. 51. See further, *England v. Downs*, 1 Beav. 96; *Egan and others v. Keenan and others*, 1 Flan. and Kel. 39.

1823.—Wright v. Howard.

defence of the house. If the hay-stack was only for use, it would pass; if for sale, it would not pass. [1]

\*WRIGHT v. HOWARD. HOWARD v. WRIGHT.

[\*190]

1823, 4th, 5th, 8th, and 19th February.—*Specific performance.—Right to river water.*

The court refused to decree the specific performance of an agreement to purchase the fee simple of certain lands, and also the right to impound the water of a river, and to divert from it a stream of water; because the vendor, though seised in fee of the lands, had only a lease for ninety-nine years of the other subjects of the contract, and had not, as against some of the proprietors of land on the banks of the river, a right to divert the water; and because the purchaser had entered into the contract for the purpose of erecting a manufactory to be wrought by the water, and twelve years had elapsed between the time of the agreement and the hearing of the cause.

Every owner of land on the banks of a river has, *prima facie*, an equal right to use the water, and and cannot acquire a right to throw the water back on the proprietor above, or to divert it from the proprietor below, without a grant, or twenty years' enjoyment, which is evidence of a grant.

*Quere.* To what extent time is of the essence of a contract, where the purchase is intended with a view to commercial purposes, as the erection of a manufactory?

The original bill in this case was filed by the vendor, and prayed for the specific performance of an agreement, contained in three several memorandums in writing, for the purchase of land, and of the right of using the stream of the river Goit by impounding the water. The cross bill was filed by Howard, the purchaser, and prayed that the agreements might be delivered up to be cancelled; because they had been obtained by fraud and misrepresentation, as well as because the vendor could not make a good title.

Before the agreement in question was made, Nathaniel Wright, the plaintiff in the original suit, was in possession of land situated on the bank of the river Goit, and had erected a weir on that river to divert the stream into his land, with a view to erect a mill, which was to be wrought by this stream. He had also made a sluice and two reservoirs for the water diverted by the weir, to secure a constant supply to the stream which was to be used for the mill. By the agreement in question, Wright agreed to sell to Jesse Howard, the defendant in the original suit, the land, the weir, the sluice, and the reservoirs \*for the purpose of erecting a cotton manufactory, together with [\*191] the right to turn the water, after it had been used in the manufactory, through a piece of land called the Woodheys into the river Mersey, below the

[1] Affirmed by the Lord Chancellor on appeal, 3 Russ. 301. A residuary devise which contains an enumeration of certain articles of personal property, and adds "all the estate not before devised, including my gig, and saddle horses," is not a general residuary devise, but shall be construed to include only property of the same kind as the articles enumerated. *Minor's ex'rs v. Dabney*, 3 Rand. (Virginia) 191. The word "*money*" in a residuary clause means only cash, and not bonds, mortgages, or choses in action; unless it appear that the testator intended to use the term, in an extended sense. *Mann v. Mann*, 14 Johns. Rep. 1. Vide *Besoby v. Pack*, post, 500. Manuscripts pass under a bequest of books; *Willis v. Curteis*, 1 Beav. 189.

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 1823.—Wright v. Howard.
 

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junction of the Goit with that river. By turning the water in at this place and in this direction, a fall of twenty-three feet was obtained. But between the weir and the point where it was thus agreed that the water should be turned in, there were three proprietors on the banks of the river : namely, the Duke of Norfolk, (then Mr. Bernard Howard,) Mr. Arden, and Mr. Tatton. The only question of title was, as to the right to the water and to the reservoirs.

The first memorandum of agreement, was dated the 6th September, 1809. it recited that the plaintiff had a water-fall, on the river Goit, upon which he had erected a weir, and made a goit (sluice) to other his lands, called Wood-head, and Woodheys ; and it then contained an agreement to sell the water-fall, weir and goit, and the land and buildings, to the defendant, reserving a yearly rent of 330*l*. ; and the defendant was to covenant, that he would, within five years, erect buildings to the value of 7,500*l*. on the land.

The second memorandum was dated the 15th September, 1809, and was made for the purpose of stating the agreement more distinctly. It was expressed as follows : " Mr. Wright to convey to Mr. Howard at his expense, the fee simple of and in a messuage, &c." (describing the land, buildings, and other particulars) "also the weir, culvert and stop-gates erected by Mr. Wright across the river Goit, and the privilege of impounding the stream of the river Goit thereby, as high towards Marple Bridge as Mr. Wright has power to do ; and also of using the goit (sluice) lately made by Mr. [\*192] Wright through his field, called the Ridge-eyes-fold into \*the Wood-head, with the intention of diverting the said stream ; also the use of the reservoirs made by Mr. Wright for preserving the stream of water.

The third memorandum was dated the 25th of May, 1810 ; and, after reciting the agreement, it provided that, in lieu of the yearly rent of 330*l*. Howard should pay the sum of 6,600*l*. in two payments, 3,000*l*., on the 4th June, 1810, and 3,600*l*., without interest, on the 24th June, 1813 ; for which last sum Howard was to give his bond ; and it then stated that Howard should have full power, right, and title to turn and discharge the water into the river Mersey, through any part of the Woodheys which he should think proper.

Soon after this last memorandum was executed, some difficulties suggested themselves to Howard as to the power of the plaintiff, Wright, to make a title to the privileges thus agreed to be sold ; and, as these difficulties seemed to him insurmountable, on the 16th of July, 1810 he sent a notice in writing to the plaintiff, stating that, in consequence of the defects in the title, he relinquished and gave up the agreement, and required that that part of the purchase money which he had paid should be returned to him.

When Wright produced his title, it appeared that he had not a fee simple interest in the right to use the water ; and that part of the land which formed one of the reservoirs was leasehold for a term of years. His title to the water was by a lease from Mr. B. Howard, (now the Duke of Norfolk,) dated the

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30th of October, 1809. By this lease, which was for the term of ninety-nine years, the land, of which a part was covered by one of the reservoirs included in the agreement, was demised to Wright, his executors, administrators, \*and assigns, together with an authority to divert the water [\*193] of the river Goit, by means of the weir which he had then lately erected, for the purpose of a cotton manufactory, into the land agreed to be sold to Mr. Howard ; but upon the express condition that he returned a part of the water so used into the river Goit, at a point far above its junction with the Mersey, and therefore far above the Woodheys, the place at which it was stipulated by the agreement that Mr. Howard should have the privilege of returning it.

Besides this, it appeared that between the junction of the Goit and Mersey, and the place at which, according to the agreement, the water was to be returned through the Woodheys, two other proprietors, Mr. Tatton and Mr. Arden, possessed lands on the banks of the Mersey.

Mr. Howard having given notice that he would not perform the agreement on account of defect in the title, Mr. Wright, on the 11th February 1811, filed the original bill for a specific performance of the contract. In February 1815, Mr. Howard filed the cross bill. On the 14th of March 1816, Mr. Wright obtained a new lease from the Duke of Norfolk, on the surrender of his lease of the 30th of October 1809 ; and, by this new lease, all that was comprised in the former lease was re-demised to him for the term of ninety-four years, and the obligation to return the stream of the river Goit into that river before its junction with the Mersey, was discharged, and an unrestricted enjoyment of the stream was granted during the continuance of the lease.

In 1818 Wright died ; and in that year his representatives filed a supplemental bill, which stated this \*new lease, and insisted on the [\*104] specific performance of the agreement.

It appeared by the evidence, that if the stream, the use of which was to be granted to Howard, was turned into the Mersey through the Woodheys, according to the agreement, a greater fall by three feet would be gained than could be had by returning it into the river Goit at any point above the junction of that river with the Mersey. This additional fall was of great importance to the cotton manufactory. It also appeared, that the privileges as to the use of the water, which were contained in the agreement, constituted the most valuable part of the subject of the contract ; and that, without these privileges, the property was not worth more than one-third of the price which Mr. Howard agreed to pay.

The objections to the title which were insisted upon by Howard were, therefore :

*First*, as to the weir ; that Wright, as against the Duke of Norfolk, the proprietor of land on one bank of the river above the weir, had acquired no right to maintain it beyond the term of his lease ; whereas, the language of the agreement imported an absolute right :

*Second*, that the agreement was expressed for an unqualified grant, in fee

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simple, of the use of the two reservoirs ; whereas one of these reservoirs was upon a part of the land demised for a term of years by the Duke of Norfolk to Wright :

*Third*, that, at the time when the last memorandum of agreement [\*195] was executed, by which Wright expressly engaged that Howard should have the power of turning the stream into the river Mersey, through any part of the field called the Woodheys, which was the subject of Howard's purchase, Wright had no power to grant any such privilege ; but was bound by his lease from the Duke of Norfolk to return the water into the river Goit at a point much above the Woodheys, and was, consequently, then unable, as against the Duke of Norfolk, to perform his contract. And that, although by the new lease of March 1816, the Duke of Norfolk had dispensed with that obligation, yet he had dispensed with it only for a term of years, and not absolutely ; and that, as against Mr. Tatton and Mr. Arden, the other proprietors of land between the weir and the Woodheys, there was no ground for stating, that Wright had acquired the power of diverting the water into the river Mersey, which he had undertaken to grant to Mr. Howard.

Besides these objections, Howard insisted, in his answer to the supplemental bill, that, at such a distance of time, (it being then ten years since the agreement was made) the vendor was not entitled to have it specifically performed ; that the land and buildings had become waste and dilapidated, so as to have greatly decreased in value ; that he had entered into the agreement for the purposes of trade ; and that, on account of the delay, together with the change of times and circumstances, he could not now make use of the subject of the contract for the purposes intended at the time when the agreement was made ; although they might have been advantageously used for those purposes at the time when the agreement was made, if Wright had been able to make a title to the stream of water according to his contract. It was also stated by Howard, \*in his answer to the original bill, that it would cost 15,000*l.* to build the intended cotton manufactory, so as to have the benefit of the stream of water, and that, after expending so large a sum, the right to the use of the water must determine with the lease.

The original and cross cause now came on to be heard together. There was no evidence in support of the fraud charged by the cross bill ; and that point was not much insisted on at the hearing.

*Mr. Bell* and *Mr. Koe* for the plaintiff, in the original cause :—

I. The terms of the agreement do not import a sale of the fee simple interest in the right to use the water. The words fee simple, refer merely to the land ; and there is nothing on the face of the agreement which shows that Wright professed to give a fee simple right to impound the water as high as Marple Bridge : on the contrary, it is expressed to be such privilege of impounding as Wright had. This privilege is mentioned in the agreement as something distinct and separate from the land.

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II. As to the right to divert the water from the proprietors of land on the banks of the river between the weir and the Woodheys, there is no authority for the position, that a proprietor of land on the banks of a river has no right to divert the water of the river which runs by the land of any other proprietor, unless he returns the water again so as to run by the land of that proprietor. According to the principles of the law on this subject, a proprietor of land on the banks of a river has a right to divert the water, unless he <sup>does it</sup> [\*197] so as to occasion an actual injury to a neighbor. Without an actual injury, there can be no right of action. In the present case, where the weir was erected so long ago as 1804, and no complaint of any injury being sustained by it was made by any of the neighbors, an actual right to use the water, may be considered to have accrued at this distance of time. Certainly, after so long an acquiescence by the neighbors, without any complaint of an injury, no court of equity would now grant an injunction against this weir. Therefore, as there is no room to say that the neighbors have been injured by the water being diverted, there is no room to say that the plaintiff had not a right to divert it by this weir, and to enjoy those rights which he agreed to sell to the defendant.

III. As to the objection of the length of time that has elapsed, there is no ground for holding that, in the present case, time is of the essence of the contract. It was not, till the answer to the supplemental bill in 1819, that this objection was taken by the defendant. In none of the previous answers was that point mentioned. Time cannot be of the essence of the contract, unless the parties make it so by the terms of the contract. There may be cases in which, if the contract is entered into with a view to commercial purposes, the court will be disposed to consider time as of the essence of the contract. But that cannot be done where no such objection is raised until the expiration of several years from the commencement of the suit.

IV. The plaintiff has a right to a reference, that he may have an opportunity to perfect his title. The alleged defects are subjects for compensation.

\*Mr. Pechel, for one of the representatives of Wright.

[\*198]

Mr. Agar, Mr. Heald, and Mr. Parker, for the defendant in the original suit :—

I. The terms of the agreement are express as to a fee simple interest in the whole subject of the contract. An agreement to grant, without qualification, must necessarily mean a grant of an absolute right; and any limitation of that right must be expressed. But the extent of the money to be laid out in erecting the manufactory, and the amount of the purchase money, sufficiently show that a fee simple interest in the whole subject of the agreement, was in the contemplation of the parties. It cannot be supposed that the defendant would have entered into this contract, if, after having expended so large a sum in erecting a manufactory, the whole of the money thus expended might become useless after the expiration of the existing lease, by a refusal, on the part of the Duke of Norfolk, to renew it.



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II. As to the right to use the water, the plaintiff had no title, as against Mr. Tatton and Mr. Arden, either by grant or prescription. He might be compelled by them to remove the weir. The mere erection of the weir and the diversion of the water so as to diminish the quantity which passed their land, was injury enough. Taking away the water must, of itself, be injurious.

III. This is precisely one of those cases in which the court will hold time to be of the essence of the contract, and will not, after such a lapse of time, decree the specific performance of this agreement. In *Crofton v. Ormsby*,<sup>(a)</sup> it was laid down by Lord Redesdale as the doctrine of courts of equity, that a specific performance \*of an agreement for a purchase would not be decreed, where the object of one of the contracting parties would be defeated by delay which had taken place. This doctrine is most thoroughly adhered to in cases where the purchase contemplated by the agreement, is with a view to a commercial purpose. On this ground, in a case of [\*200] *Parker v. Frith*,<sup>(b)</sup> the court refused to decree \*specific performance of an agreement for the lease of a coal-mine, where a considerable delay had taken place. But, in the present case, where the contract was entered

(a) 2 Sch. & Lef. 604.

(b) This case was decided by the Vice-Chancellor in 1819. There does not appear to be any entry of the case in the registrar's books. The following report of the case is from an authentic source.

#### PARKER v. FRITH.

1819, 17th June.—*Specific performance*.—Bill for the specific performance of an agreement to take a lease, for forty-two years, of iron and coal mines and machinery, for the purpose of trade, dismissed on account of delay on the part of the lessor to make out his title, and to give possession at the time stipulated in the agreement.

This was a bill for the specific performance of an agreement, entered into by the defendant, to take a lease of certain mines, and to purchase certain machinery and tools, at a valuation.

The plaintiff agreed to grant to the defendants a lease, for a term of forty-two years, at certain specific rents, of an iron-stone mine, a coal mine, a blast furnace and engine; and the tools, &c. were to be paid for by the defendants, according to a valuation to be made by arbitrators. The agreement was made on the 27th of March 1810; and it provided that the lease should commence, and possession be given as to the minerals, from Michaelmas 1810, and as to the works, from Lady-day 1811. The plaintiff was informed that immediate possession, at these dates, was of great consequence to the defendants, with a view to the purposes of their trade, which they carried on as partners. The plaintiff, however, did not deliver an abstract of his title till February 1811, when it appeared, that, on account of some subsisting mortgages to which the plaintiff's estate was liable, it was necessary that the mortgages should concur in the lease, although the plaintiff had not made arrangements to procure their concurrence. When the abstract was delivered, the defendants complained of the delay, and stated to the plaintiff, that it had already been injurious to them, and that they should require compensation; and the plaintiff, upon this, promised them a reasonable compensation. Further delays and difficulties occurred, which made the defendants, before August 1811, abandon all thoughts of the agreement being performed. They therefore were then obliged to provide elsewhere the iron which they intended to have made, before that time, in the furnace, which was part of the subject of the agreement. They therefore refused to name arbitrators to proceed with the valuation, according to the agreement. The plaintiff, in September 1811, served a notice upon them, requiring them to name arbitrators, and on their refusal, he himself appointed arbitrators, who proceeded to a valuation *ex parte*; and in Trinity term 1812, he

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into with a view to a commercial establishment, on which a large sum of money was to be expended, and where fourteen years had elapsed since the contract was made, it would be not only unjust, but highly impolitic, if the defendant was forced to a performance of the contract. According to the terms of the agreement the manufactory was to be erected within five years from the time when the agreement was made; and it would now be too great a hardship to force upon him an agreement of which that was one of the conditions. If the defendant, desiring to embark all his property in this undertaking, was induced to enter into this engagement, and then found that the vendor could not put him in possession, would the court act on a principle which must suppose that the defendant, thus contracting, was to give over all thoughts of employing his money in trade until a chancery suit was decided? Was he to keep his capital unemployed all the while, because, at the end of twelve years, the vendor, by some acts done in the interval, was able at that \*distance of time to make a title? Or to put it the other way: sup- [\*201] pose that the defendant, finding that the vendor could not make a title according to the agreement, gave notice in 1810 (as was done in this case) that he considered the agreement at an end; that he then entered into some other speculation; built a factory, perhaps, elsewhere; that in the course of some years a change of times takes place, adverse to such speculations: what a monstrous hardship it would be to force the application of the ordinary rule in such a case, and to hold the defendant to the ordinary rule, which would compel a specific performance?

IV. This is no case for compensation. It is a case where the vendor, having only a leasehold title, undertakes to sell the fee simple, and is within the class of cases on this subject which decide that there ought to be no specific performance in such cases. In the case of *Tendring v. London*,<sup>(c)</sup> where one contracted to sell an estate of which he was not the absolute owner, and had it not in his power, by the ordinary course of law or equity, to make himself so, though the owner offered to make the vendor a title, yet the court

filed his bill for a specific performance. The plaintiff having died soon after the bill was filed, his representatives revived the suit in 1815.

In 1819 this cause came on to be heard.

Mr. Bell, Mr. Shadwell and Mr. Wrottesley for the plaintiff.

The Vice-Chancellor, considering the object of the agreement, and the delay which had taken place, refused to decree a specific performance, according to the terms of the agreement, and said that he could not, from the nature of the case, see his way to direct a specific performance with a pecuniary compensation. The defendants having made some unfounded objections, were refused their costs.

Bill dismissed without costs.

Vide *Withy v. Cottle*, ante, 174. There is a settled distinction between the case of a vendor coming into a court of equity to compel a vendee to performance, and of a vendee resorting to equity to compel a vendor to perform; *Waters v. Travis*, 9 Johns. Rep. 450.

(c) 2 Eq. Abr. 680, pl. 9.

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[\*202] would not force the purchaser to take it. (d) And the general \*doctrine of the court warrants the proposition, that where a man undertakes to sell an estate, knowing at the time that he has no title, the court will not compel the purchaser to a specific performance, even although the vendor procures a title before the master makes a report.

The VICE CHANCELLOR :—The first consideration is, whether the original plaintiff, Mr. Wright, could, when he received the notice of abandonment from Mr. Howard, or at the time when the original bill was filed, give to Mr. Howard an effectual title to the different subjects of the contract. And the next consideration will be, whether he can now make such effectual title. It is objected to the title, first, that as to the weir itself, Mr. Wright had no right to maintain it for the purpose of throwing back the water, as against the Duke of Norfolk, considered as the proprietor of the land above, except originally for the term of the lease of the 8th October 1809, and now for the term of the lease of the 14th March 1816. Secondly, that, as against the Duke of Norfolk, considered as the proprietor of the land below, Mr. Wright had no title to turn the water, diverted by means of the weir, into the Mersey, from the western point of the Woodheys, until he obtained the lease of March 1816, and that he now has no right so to turn the water, except for the term of that lease. Thirdly, that as against Mr. Tatton and Mr. Arden, the other proprietors of the land below the weir, Mr. Wright never had, and his representatives have not now, any title to turn the water, diverted by means of the weir, into the Mersey, from the said western point of the Woodheys. And

[\*203] \*lastly, that as to one of the two reservoirs, the unqualified use of which Mr. Wright agreed to grant to Mr. Howard, it is made, in part, upon land demised by the Duke of Norfolk originally by the lease of October 1809, and now by the lease of March 1816; and, consequently, Mr. Wright, or his representatives, have no title to it, except for the term of the lease.

The right to the use of water rests on clear and settled principles. *Prima facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water.[1] Every pro-

(d) In *Drewe v. Corp*, 9 Ves. 368, it is stated to have been decided that the principle of compensation cannot be extended to compel a purchaser to take a leasehold, though for a very long term, instead of a freehold title. On referring to the register's book, the following are the facts of that case, as stated in the master's report, which was adopted by the decree. The master found that the plaintiff could make a good title to the estate in question, upon John Langdon joining in the conveyance: and he found that John Langdon was then seised of the fee simple in the estate, subject to a mortgage term of 4000 years, foreclosed by a decree of this court in 1776, and then vested in trust for the plaintiff; and also subject to a mortgage of the reversion in fee, made in the year 1763, to one Degony King, but which was then vested in the plaintiff; but that John Langdon refused to join in a conveyance, and therefore the master found that the plaintiff could not make a good title. *Drewe v. Corp*, Reg. Lib. A. 1803, f. 290.

[1] Vide *Palmer v. Mulligan*, 3 Caines' Rep. 307; *Jackson v. Low*, 12 Johns. Rep. 252; *The People v. Platt*, 17 Johns. Rep. 195; *Hooper v. Cummings*, 20 Johns. Rep. 91; *The People v. Seymour*, 6 Cow. 579; *ex parte Jennings*, 6 Cow. 518; *The People v. The Canal Appraisers*; 13 Wend. 355; *Hatch v. Dwight*, 17 Mass. Rep. 239; the rules on this subject, apply only to streams

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prietor has an equal right to use the water which flows in the stream; and, consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above.[2] Every proprietor who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years: which term of twenty years is now adopted, upon a principle of general convenience, as affording conclusive presumption of a grant.[3] It appears to me, that no action will lie for diverting or throwing back water, except by a person

which are not navigable, and are beyond the ebb and flow of the tide. Cases cited *supra*. Where the water of a river is divided by an island, so that only one fourth of the stream descends on one side of the island and the residue on the other, the owner of the shore where the largest quantity of water flows, is entitled to the use of the whole water flowing there. *Crooker v. Bragg*, 10 Wend. 260.

[2] An action will not lie for diverting the water of a river from its usual course by erecting a dam for mills above the mills of another, if sufficient water be left to work the lower mills, though in consequence of such erection it be necessary to run the mill dam of the lower mills, further into the stream, and the difficulty of getting logs to the lower mills be increased. *Palmer v. Mulligan*, 3 Caines' Rep. 307. Where a spring of water rises upon the land of one owner, and from it runs a stream on to the land of another, the owner of the land upon which is the spring has no right to divert the stream from its natural channel, although its waters are not more than sufficient for his domestic uses, for his cattle, and for the irrigation of his land. *Arnold v. Foot*, 12 Wend. 330. A stream of water cannot be diverted from its natural course without the consent of the owner, over or by whose land it passes; although such owner may not require the whole or any part of it for the use of machinery. *Crooker v. Bragg*, 10 Wend. 260. See further, *Smith v. Adams*, 6 Paige, 435; *Case v. Haight*, 3 Wend. 632.

[3] In *Belknap v. Trimble*, 3 Paige, 577; Walworth, Ch. says; "The learned commentator on American law, lays it down as the established doctrine, both here and in England, that the exclusive enjoyment of water in a particular way, for twenty years, without interruption, becomes an adverse enjoyment sufficient to raise a presumption of title, as against a right in any other person, which might have been, but was not asserted. Neither is it necessary that the person claiming this prescriptive right to the use of water should have used it in the same precise manner during the twenty years: or that it should have been used to propel the same machinery." (But see *Stiles v. Hooker*, cited *infra*.) "All that the law requires is that the mode or manner of using the water should not have been materially varied to the prejudice of others." (See 3 Kent's Com. 2d ed. 442.) "I apprehend also that this rule must be reciprocal; and that a proprietor at the head of a stream who has changed the natural flow of the waters, and has continued such change for more than twenty years, cannot afterwards be permitted to restore it to its natural state, when it will have the effect to destroy the mills of other proprietors below, which have been erected in reference to such change in the natural flow of the stream." Twenty years occupation of the land of another by flowing it with water, affords a presumption of a grant of the use of it, in that particular manner. *Baldwin v. Calkins*, 10 Wend. 167. Where one has had the use of water, at a given height for twenty years, a grant will be presumed of the privilege of using it at that height; but nothing more. *Stiles v. Hooker*, 7 Cow. 266. Chancery has jurisdiction to protect the right to water, thus acquired by prescription, and to enjoin from the disturbance of it. *Belknap v. Trimble*, *supra*.

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who sustains an actual injury; but the action must lie at any time within twenty years when the injury happens to arise, in consequence of a new purpose of the party to avail himself of his common right. The question [\*204] of title as to the water, in this case, will readily be tried by these plain principles. It appears by the recitals in the lease from the Duke of Norfolk in October 1809, that the weir which throws the water back above, was erected by Mr. Wright in 1804: and, consequently, Mr. Wright could have no title to maintain this weir against the Duke of Norfolk considered as the proprietor of land above, excepted by actual grant; and that grant is to be found in the lease of October 1809, and also in the subsequent lease of March 1816, and therefore endures only for the term of the latter lease, and is not a grant in fee simple, according to the effect of Mr. Wright's agreement with Mr. Howard.

As against the Duke of Norfolk, considered as the proprietor of land below, Mr. Wright was bound, by the lease of October 1809, to return the water which should be diverted by the weir into the river Goit, at a certain point stated, and consequently had no title to enable Mr. Howard, according to the agreement, to turn the water so diverted into the Mersey, at the west end of the Woodheys. Mr. Wright afterwards, by the lease of March 1816, acquired, as against the Duke of Norfolk, considered as such proprietor below, this right to turn the water into the Mersey; but he acquired it, not in fee simple, according to the effect of his agreement with Mr. Howard, but for the term of that lease only.

With respect to Mr. Tatton and Mr. Arden, the other proprietors of the land below, between the weir and the west end of the Woodheys, it is clear that Mr. Wright could have no right, at the time of filing the original bill, to turn the water into the Mersey below their lands, except by express [\*205] grant or license; and no such grant or license is pretended. The time that has since elapsed can afford no presumption of such a grant; because, in fact, the water has not been so turned into the Mersey.

The last objection to the title does not apply to the use of water, but to the land demised by the Duke of Norfolk, which forms a part of one of the reservoirs. Mr. Wright has undertaken to grant the use of this reservoir, in fee simple, to Mr. Howard. It is plain he can make no title to it, except for the term of the Duke of Norfolk's lease.

Upon the whole, I am of opinion that Mr. Wright not only could not make a good title, in the four respects which have been stated, at the time when Mr. Howard gave notice of his intention to abandon the contract, and at the time of filing the original bill, but that he cannot now make a good title in either of these respects. Without thinking myself called upon to make a declaration as to the distinction between land contracted for as a purchase, and land contracted for with a view to be used for a different purpose, I cannot now give to the representatives of Mr. Howard a good title before the master, in order

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Howard, at the distance of fourteen years, to return to a commercial speculation, which he was then obliged to desert, from Mr. Wright's inability to perform his engagement. [1]

The bill must be dismissed, and with costs; except as to so much of the costs as may have been occasioned by Mr. Howard's suggestions of fraud and misrepresentation, which are altogether disproved; and let those costs be paid by Mr. Howard. With respect to the cross bill, I shall [\*208] direct the three agreements to be delivered up to be cancelled; but I sh<sup>al</sup>. make this decree without costs; because this cross bill prays that it may be declared that these agreements were obtained by fraud and misrepresentation, allegations which, I have before stated, were altogether disproved; and it is the duty of the court to discourage the abuse of its proceedings by the introduction of impertinent suggestions of fraud, which prove to be altogether unfounded. [2]

POTT V. GALLANT.

THE 12 FEBRUARY. — Administration of estate. — Plaintiff.

After a decree for the administration of the estate of the deceased, and a further decree that a bill praying for the same should not be taken, the plaintiff moved for a decree that the same should be taken, and that the plaintiff should be allowed to recover the costs of the same. The court granted the bill, and the plaintiff was allowed to recover the costs of the same.

I the court do hereby decree that the plaintiff's bill be taken, and that the plaintiff be allowed to recover the costs of the same.

Given under the seal of the court, at the City of London, the 12th day of February, 1893.

The court do hereby decree that the plaintiff's bill be taken, and that the plaintiff be allowed to recover the costs of the same.

I the court do hereby decree that the plaintiff's bill be taken, and that the plaintiff be allowed to recover the costs of the same.

Given under the seal of the court, at the City of London, the 12th day of February, 1893.

The court do hereby decree that the plaintiff's bill be taken, and that the plaintiff be allowed to recover the costs of the same.

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who sustains an actual injury; but the action must lie at any time within twenty years when the injury happens to arise, in consequence of a new purpose of the party to avail himself of his common right. The question [\*204] of title as to the water, in \*this case, will readily be tried by these plain principles. It appears by the recitals in the lease from the Duke of Norfolk in October 1809, that the weir which throws the water back above, was erected by Mr. Wright in 1804: and, consequently, Mr. Wright could have no title to maintain this weir against the Duke of Norfolk considered as the proprietor of land above, excepted by actual grant; and that grant is to be found in the lease of October 1809, and also in the subsequent lease of March 1816, and therefore endures only for the term of the latter lease, and is not a grant in fee simple, according to the effect of Mr. Wright's agreement with Mr. Howard.

As against the Duke of Norfolk, considered as the proprietor of land below, Mr. Wright was bound, by the lease of October 1809, to return the water which should be diverted by the weir into the river Goit, at a certain point stated, and consequently had no title to enable Mr. Howard, according to the agreement, to turn the water so diverted into the Mersey, at the west end of the Woodheys. Mr. Wright afterwards, by the lease of March 1816, acquired, as against the Duke of Norfolk, considered as such proprietor below, this right to turn the water into the Mersey; but he acquired it, not in fee simple, according to the effect of his agreement with Mr. Howard, but for the term of that lease only.

With respect to Mr. Tatton and Mr. Arden, the other proprietors of the land below, between the weir and the west end of the Woodheys, it is clear that Mr. Wright could have no right, at the time of filing the original bill, to turn the water into the Mersey below their lands, except by express [\*205] grant or license; and no such grant or license is pretended. The time that has since elapsed can afford no presumption of such a grant; because, in fact, the water has not been so turned into the Mersey.

The last objection to the title does not apply to the use of water, but to the land demised by the Duke of Norfolk, which forms a part of one of the reservoirs. Mr. Wright has undertaken to grant the use of this reservoir, in fee simple, to Mr. Howard. It is plain he can make no title to it, except for the term of the Duke of Norfolk's lease.

Upon the whole, I am of opinion that Mr. Wright not only could not make a good title, in the four respects which have been stated, at the time when Mr. Howard gave notice of his intention to abandon the contract, and at the time of filing the original bill, but that he cannot now make a good title in either of these respects. Without thinking myself called upon to make any general declaration as to the distinction between land contracted for as mere property, and land contracted for with a view to be used for a commercial establishment, I cannot now give to the representatives of Mr. Wright the chance of perfecting their title before the master, in order that I may compel Mr.

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Howard, at the distance of fourteen years, to return to a commercial speculation, which he was then obliged to desert, from Mr. Wright's inability to perform his engagement. [1]

The bill must be dismissed, and with costs; except as to so much of the costs as may have been occasioned by Mr. Howard's suggestions of fraud and misrepresentation, which are altogether disproved: and let those costs be paid by Mr. Howard. With respect to \*the cross bill, I shall [\*206] direct the three agreements to be delivered up to be cancelled; but I shall make this decree without costs; because this cross bill prays that it may be declared that these agreements were obtained by fraud and misrepresentation, allegations which, I have before stated, were altogether disproved; and it is the duty of the court to discourage the abuse of its proceedings by the introduction of imputations disgraceful to character, which prove to be altogether unfounded. [2]

POTT v. GALLINI.

1823, 3d February.—*Administration of assets.—Practices.*

After a decree for the administration of assets in an amicable suit, a creditor having filed a bill praying for the usual accounts (which had been directed by the former decree,) and also to have the assets marshalled (which was not prayed for or decreed in the first suit,) the court made a second decree, directing the usual accounts and the assets to be marshalled, with liberty to the master to use the accounts taken under the former decree.

If the second suit had been merely for the same objects as the first, the decree in the first suit would have been a bar to it, and the court, on motion before answer, would have ordered all proceedings in it to be stayed.

Query, Whether there can be a decree to marshal the assets where the heir-at-law is an infant?

THE plaintiff in this suit was a simple contract creditor of Francis Cecil Gallini, deceased. The bill was filed by her in April 1817, on behalf of herself and the other simple contract creditors of Gallini who should contribute to the expense of the suit, against his heir-at-law and executors, and also against other persons, who were charged with having possessed assets of the debtor; and it prayed for an account of Gallini's assets, that they might be applied in

[1] That a purchaser will not be compelled to take a defective title, see Amer. Ch. Digest, Agreement, IX; Vendor and Purchaser, VIII. Nor a doubtful title; *Sebring v. Mersereau*, 9 Cow. 344. A mere deficiency in quantity of the land to be conveyed, if susceptible of compensation, will not prevent a specific performance from being decreed; *Hepburn v. Auld*, 5 Cranch, 262. It is sufficient if the vendor can make a good title before the decree is pronounced. *Ib.* *Hepburn v. Dunlop*, 1 Wheat. 179; *Seymour v. Delaney*, 3 Cow. 445; *Pierce v. Nichols*, 1 Paige, 244. See further, *Cann v. Cann*, post, 284; *Barclay v. Raine*, post, 449; *Baldwin v. Salter*, 8 Paige, 473. A purchaser having filed a bill for a specific performance, and the master having on reference reported against the title, may notwithstanding waive the objection and compel the vendor to perform the agreement. *Bennett v. Fowler*, 2 Beav. 302.

[2] As to costs in such cases, vide *Lawless v. Shaw, Lloyd & Gould*, 154.



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a due course of administration, and that they might be marshalled. It appeared, that, in 1815, very soon after Gallini's death, an amicable suit was instituted for the administration of his assets, in which his children, who were the residuary legatees and infants, were the plaintiffs, and his executors and trustees, the defendants; that, in July 1816, a decree was made in that [\*207] suit, which directed the usual accounts to be taken, and the debts to \*be paid. Under this decree, the master took the necessary proceedings, and caused advertisements for creditors to be published. Nearly all the creditors had come in before the master, and the time limited for proving their debts had expired in December 1816. The plaintiff in this suit had not come in to prove her alleged debt under that decree. The defendants, the executors, therefore submitted to the court, by their answer, whether the plaintiff ought not to have proved her alleged debt before the master in the prior suit; and whether she was now entitled to proceed in this suit.

No report had been yet made by the master, in the first cause; and the bill in that cause did not pray that the assets might be marshalled, nor was that directed by the decree.

The plaintiff in this cause moved, on the 15th of April 1818, pursuant to a notice, that a fund in court in the first cause might be transferred, so as to stand as a fund in this cause. The court, on this motion, did not direct the fund to be transferred; but ordered that it should not, in any manner, be disposed of without notice to the plaintiff in this cause, and that she should be at liberty, by her solicitor, to attend the master on taking the accounts of the personal estate directed by the decree in the first cause.

The cause came on now to be heard.

Mr. Bell, Mr. Treslove and Mr. Fearnley, for the defendants, insisted that the decree in the former suit was sufficient, and that they were entitled [\*208] to the same benefit of that decree, in the present suit, as if they \*had pleaded it. As to marshalling the assets, that might be done at any time, on an application in the former suit. It was decided, in *Gibbs v. Ogier*, (a) that a new bill is not necessary for that purpose, in such a case as the present. In order, therefore, to justify the plaintiff for instituting this suit, it is necessary that she should prove satisfactorily that she had no notice of the prior suit and decree. In one respect this suit is more defective than the other, inasmuch as the residuary legatees are not made parties to it. If the court should be disposed to think this suit justifiable, it would be the most convenient course to have it stand over till after the master's report is made in the prior suit.

Mr. Hart and Mr. Wakefield, for the plaintiff, said, there were two material questions to be considered in this case. 1st, In what respect a creditor was

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(a) 12 Ves. 416. In that case it was said by Sir W. Grant, M. R. "that if it appeared for the first time by the report, that a specialty creditor was paid out of the personal estate, it would not be necessary to file another bill for the purpose of marshalling the assets." That must of course apply only to cases where the heir-at-law or devisees are parties to the first suit.

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to be delayed by the decree in the suit already subsisting? And 2d, Whether the filing of the bill in the present cause was a step so unnecessary and vexatious, that the court would not make a decree upon it? As to the first question, the primary object of the prior suit was, not to satisfy the creditors, but to have the accounts taken in an amicable way, and to restrain the creditors from proceeding at law. The relief to be had under that suit was not so ample as that to which the creditors were entitled, and which is sought, by the present bill. The heir-at-law was a plaintiff in the other \*suit; [\*209] and there was no case in which, where the person who had an interest to repel the claims of creditors was a plaintiff in a subsisting suit, the court had thought that a sufficient reason to refuse to make a decree at the suit of a creditor. The plaintiff in this cause sought to have the assets marshalled, which had not been done in the first suit.

Mr. *Bell*, in reply, said, that the heir-at-law was an infant when the decree in the first cause was made, and that, therefore, the assets could not be marshalled, because the parol would have demurred.

Mr. *Hart* denied that the law was so, and said, that the parol demurring could not delay a declaration of the rights of the parties.

The VICE-CHANCELLOR :—Inasmuch as the creditors are entitled to have the assets marshalled, and cannot have that benefit under the former decree, I shall make a second decree for the accounts, adding a direction to marshal the assets; and that the master shall be at liberty to use, in this cause, the accounts taken in the former cause. I recommend an application to be made, in both causes, that there may be only one report in both causes, and that they may both come on to be heard together for further directions.

Where there is a prior decree, and a second suit for the same accounts, and no further relief than can be had before the master under the first suit, the proper course is, to move that the proceedings in the second suit may be stayed, and that the plaintiff may go before the master in the first suit. It is not the proper \*course to insist upon the first suit, in the answer, as [\*210] a bar to the second, because putting in an answer, in such a case, leads to an unnecessary expense.

If the second suit prays further relief than can be had in the first suit, then the defendant must answer; and the proper course is, to insist, in the answer, upon the first suit, as a bar to a second decree for the same objects.[1]

[1] The actor in a creditor's bill has so far the control of the proceedings, that he may discontinue his suit at any time before there has been a decree therein for the benefit of himself and the other creditors; and the defendant at any time before such decree has the right to have the bill dismissed upon paying what is due to the complainant with interest and costs. *Innes v. Lansing*. 7 Paige, 583. Such bill filed by one creditor; will not prevent another creditor from filing a similar bill, previous to a decree in the first suit; but as soon as a decree is obtained in either suit, for the benefit of all the creditors, the proceedings in all other suits may be stayed; if no other relief can be obtained in such other suits, than could be had under the decree already made. *Ibid*. "It can never be permitted," says the master of the rolls in *Sheppard v. Towgood*, Turn. & Russ. 379, "that the priority of a suit defective in its nature, is to exclude another suit that may introduce important

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## BALL v. STORIE.

1823, 18th February.—*Decree of the Irish court of chancery.—Deed.—Mistake.*

An injunction granted by the court of chancery in Ireland, to restrain proceedings at law in that country, on an interlocutory application, is not of itself a sufficient ground to obtain an injunction, in this court, to restrain proceedings in an action in the king's bench here, in respect of the same matter.

The construction of a written instrument is the same in equity as at law.

A court of equity will reform an instrument which, by the mistake of the drawer, admits of a construction inconsistent with the true agreement of the parties, although the party seeking to reform it himself drew the instrument.

THE plaintiff filed his original bill in this court, praying that he might be relieved against a judgment obtained against him by the defendant in the court of king's bench in Ireland, and that the defendant might be restrained, by a perpetual injunction, from proceeding in an action commenced by him against the plaintiff, in the court of king's bench here, on that judgment.

George Henry Storie, the defendant, in 1808, purchased from the Marquis of Headfort an annuity of 1,000*l.* a-year, secured on the real estates of that nobleman in Ireland, for the sum of 6,000*l.* The estates on which this annuity was charged being encumbered by annuities to an amount far exceeding the rents, an arrangement was made, in 1811, by which the Marquis of Headfort and Lord Bective, his eldest son, were to concur in suffering recoveries, with a view to having the estates conveyed to trustees, for the purpose of [\*211] being sold; and the trustees were authorized to purchase the \*annuities of the annuitants, by giving them debentures for the amount of their purchase-moneys, carrying interest at five per cent, and to be discharged out of the produce of the sale of the estates; the annuitants agreeing, upon having such debentures, to concur in the intended sale. The defendant, amongst others, acceded to this arrangement; and, in 1811, received six debentures, for 1,000*l.* each, carrying interest at five per cent. Part of the estates was sold by the trustees; but, as there were many encumbrances prior to the defendant's, and as, under the arrangement which had been entered into, each encumbrancer was to be paid off according to his priority, no part of the proceeds of the sale was received by the defendant. In the year 1816, the defendant filed his bill, in this court, against the trustees, alleging misapplication of the funds.

The plaintiff, in 1816, was the solicitor and agent for Lord Bective, in Ireland; and, in the year 1816, was in London, engaged in settling some of his lordship's affairs. Overtures were at that time made to the defendant by Lord Bective, for a settlement of the defendant's claim, provided he would

matters, without which complete justice cannot be done to the creditors." It was, in that case directed, that the subsequent suit "must be supplemental to the former suit and incorporated with it; it must be referred to the same master; the solicitor for these creditors must have liberty to attend the proceedings under the former decree; and the general account is not to be gone into anew."

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desist from the suit which he had commenced in this court. But before any arrangement on the subject could be completed, Lord Bective was obliged to leave London, and he authorized the plaintiff, as his agent, to conclude an agreement with the defendant. Accordingly, on the 13th of April, 1818, a memorandum of agreement was signed by the defendant, and by the plaintiff on behalf of Lord Bective, by which it was agreed that the 4,000*l.* should be paid to the defendant on the 24th of April, 1818, and another sum of 4,000*l.* on the 24th of July, 1818, in satisfaction of his six debentures; and in \*consideration of these payments, the defendant agreed to dismiss his [\*212] bill on payment of all his costs.

After this memorandum of agreement had been signed, it was found that the sum due to the defendant in respect of his debentures, with interest up to the 24th of July, 1818, was 8,200*l.*; and the plaintiff agreed that the defendant should have this additional sum of 200*l.* As to this additional sum of 200*l.* the plaintiff agreed to give his own security, and to bind himself, personally for the payment of it. But there was no intention that the plaintiff should make himself liable for any part of the defendant's claim beyond the 200*l.* Pursuant to this agreement, the plaintiff, on the 24th of April, 1818, paid 4,000*l.* to the defendant; and articles of agreement, dated on the same day, and made between the defendant of the one part, and the plaintiff, on behalf of Lord Bective, of the other part, were executed for the purpose of carrying into effect the agreement expressed in the memorandum; and therefore, containing amongst other provisions, a covenant for payment of the 4,000*l.* on the 10th of July, 1818: but this covenant was so framed as to make the plaintiff personally liable for the 4,000*l.*, as well as for the 200*l.*

Lord Bective did not pay the 4,200*l.* on the 10th of July, 1818, pursuant to this agreement, and, therefore, soon afterwards, the defendant brought an action against the plaintiff for the 200*l.*, and recovered that sum. In consequence of the non-payment of the remaining 4,000*l.*, the defendant recommenced his proceedings in this court, against the trustees upon the debentures. In 1821, however, he discovered that the articles of agreement were so drawn as to make the \*plaintiff personally liable for the 4000*l.*; [\*213] and, therefore, immediately commenced an action against him in the court of king's bench in Ireland, and recovered judgment for that sum. Upon this the plaintiff filed a bill in the court of chancery in Ireland, stating the facts as to the agreement, and the mistake by which the plaintiff was made personally liable for the 4,000*l.*, and praying for an injunction to restrain the defendant from proceeding on the judgment. The master of the rolls in Ireland refused an application made to him by the plaintiff for an injunction; but the lord chancellor of Ireland, on an appeal to him, granted the injunction. The plaintiff having afterwards come over to this country, the defendant commenced an action against him in the court of king's bench here, upon the judgment recovered in Ireland. Upon which the plaintiff filed his bill in this court, stating

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the facts before-mentioned, and that the plaintiff commenced his action in this country with full notice of the injunction granted by the court of chancery in Ireland, and therefore praying that it might be declared that, under the circumstances before stated, the plaintiff was entitled to be relieved against the judgment obtained against him in the court of king's bench in Ireland, and that the defendant might be restrained, by a perpetual injunction, from proceeding on that judgment, and from all other proceedings to procure payment from the plaintiff of the 4,000*l*.

To this bill the defendant put in a general demurrer for want of equity, and the case now came on to be heard on the demurrer.

*Mr. Bell* and *Mr. Pemberton* for the bill:—

[\*214] I. As to the articles of agreement, though the plaintiff \*is through mistake, made liable at law, yet he cannot be considered liable in equity. Even at law, where one acting as an agent executes a deed, it is considered, not as the deed of the agent, but of the principal. *Wilks v. Back.*(a)

II. This court will adopt the decision of the Irish court by which the injunction was granted. It has been decided that, since the union, the judgment of an Irish court is not to be considered as the judgment of a foreign court. *Collins v. Lord Mathew.*(b) This court, therefore, will consider itself bound by the decree of the court of chancery in Ireland, just as the court of king's bench considers itself bound by the judgment of an Irish court of law.

*Mr. Trollope*, for the demurrer, relied on the fact, that the injunction obtained in Ireland had been granted on an interlocutory application; and contended that the case stated by the bill was not strong enough to induce this court to interfere.

The VICE-CHANCELLOR:—It has been insisted that this court ought to follow the court of equity in Ireland, by granting the injunction which is sought for by the plaintiff, without entering into the merits of the case. I cannot entertain that opinion. An interlocutory order of the court of chancery in Ireland, can only be regarded here, as an authority, and not as binding upon the court; although a final judgment of that court, in a case in which it has concurrent jurisdiction, might be entitled to different consideration. In

[\*215] the present case, the judgment was \*obtained in the court of king's bench in Ireland, upon a written agreement. The plaintiff alleges by his bill, that he contracted, in that agreement, as an agent merely, and not as principal. But I cannot hold that this is a case for relief in equity; because, in the construction of a written agreement, equity must follow the law. The demurrer to this bill must, therefore, I think, be allowed. But, as the real merits of the case are not raised by the present state of the pleadings; and as the plaintiff, if he can entitle himself to relief, must do so by a bill which seeks relief, by praying that the articles of agreement may be reformed according to the true intention of the parties, upon the ground that, by mistake, they have not been so framed, I shall permit the plaintiff to amend his bill.

(a) 2 East, 142.

(b) 5 East, 473.

The bill was afterwards amended, and Lord Bective made a defendant. The amended bill prayed, that the articles of agreement might be reformed according to the memorandum and the intention of the parties, by limiting the liability of the plaintiff to the payment of the 200*l.*; and that the defendant, Lord Bective, might be decreed to execute such instrument as might be necessary for binding him to the performance of the agreement on his part, and that the defendant Storie might also be decreed to do all acts necessary on his part towards rectifying the agreement. It charged, that it was not the intention of the parties that the plaintiff should make himself personally liable for any sum beyond the 200*l.* and that his personal responsibility for the payment of the 4,000*l.* was never contemplated by either party, and formed no part of the contract; and that the defendant Storie, in the bill filed by him in this court in November 1818, for carrying the agreement \*into execu- [\*216] tion, stated that it was executed by the plaintiff, on behalf of Lord Bective, and as his lordship's agent; and that it was by mistake that the agreement was so framed as to make the plaintiff liable for the 4,000*l.* The defendant Storie put in his answer to this bill, and, in effect, admitted that it was by mistake that the plaintiff was made personally liable for the 4,000*l.* But the answer stated that the articles of agreement were drawn by the plaintiff himself; that the solicitor of the defendant Storie prepared articles of agreement pursuant to the memorandum, but that the plaintiff objected to the deed thus prepared by the defendant's solicitor, on the ground that it was too long, and therefore, proposed to substitute a draft which he had himself prepared. The draft of the plaintiff was accordingly adopted, only that an additional clause was inserted, at the time, by the defendant's solicitor, which provided for the payment of the 200*l.* by the plaintiff, and rather tended to favor the construction of his personal liability for the 4,000*l.*

The plaintiff having obtained the common injunction; and the order *nisi* for dissolving it having been obtained, cause was now shown, on the merits, against dissolving the injunction.

Mr. Bell and Mr. Pemberton for the plaintiff, relied on the following cases, in which the court had reformed instruments which had been framed by mistake in a manner contrary to the intention of the parties, even where the instrument was framed by one of the parties. *Acton v. Pierce*, (c) *Bishop v. Church*, (d) *Welsh v. Harvey*, (e) *Probart v. Clifford*, (f) *Simpson v. Vaughan*, (g) \**Thomas v. Frazer*, (h) *In re Bale & Henckell*, (i) *Grace v. Freeman*, (k) *Burn v. Burn*. (l) They also contended that the mistake in this case was occasioned by the clause introduced by the solicitor of the defendant.

(c) 2 Vern. 480. S. C. Pre. Cha. 237.

(d) 2 Ves. 100, and 371. S. C. 3. Atk. 691.

(e) Cited 2 Ves. 102.

(f) Ibid.

(g) 2 Atk. 31.

(h) 3 Ves. 399.

(i) 3 Ves. 400, in not.

(k) Ibid.

(l) 3 Ves. 573. In the case of *Acton v. Pierce*, where there was a bond to the intended wife extinguished at law by the after-marriage, the principle of the decision was, that the instrument was evidence of the contract to pay; and their heirs, being named, were bound, as well as executors.

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Mr. Trollope for the defendant, insisted that the plaintiff, under the circumstances, was not entitled to have the deed reformed.

The Vice-Chancellor seemed at first disposed to think, that, as the plaintiff was himself a professional man, and drew the deed with his own hand, he was not entitled to relief on the ground of mistake. But his Honor said, he would take time to consider the case; and afterwards pronounced the following judgment.

[\*218] \*The VICE-CHANCELLOR:—If called upon to decide this case upon the present state of the record, I shall be bound to conclude that the instrument in question did not legally effectuate the real intention of the parties, and that it was not the true agreement, that the plaintiff should be personally bound for the sum of 4,000*l.* which was demanded by the action at law. For the purpose of this injunction, I assume that fact. Then the question is, whether in respect that the instrument, with the exception of the sixth clause, was drawn by the plaintiff himself, who is a professional person, he can be permitted to say, that the instrument does not contain the true agreement.

I am very much disposed to adopt the argument at the bar, that, if the instrument had been executed as drawn by the plaintiff, it would not, at law, have fixed the plaintiff with the personal obligation to pay the 4,000*l.* and that the introduction of the sixth clause, which was not drawn by the plaintiff, but by the solicitor to the defendant, has in truth occasioned the present legal construction of the instrument. If this be so, then this is reduced to the common case of an instrument to be reformed in equity, because the drawer has, by mistake, miscarried in the expression of the agreement of the parties.

If, however, this case requires the decision of the court upon the point, whether a court of equity will refuse to reform an instrument which has mistaken the intention of the parties, because it happened to be drawn by the party seeking that reformation, I am prepared to give my opinion upon that point. The rule at law, that evidence is not admissible to contradict [\*219] or \*explain a written instrument, stated, *simpliciter*, is received in equity as well as at law. A court of equity does, nevertheless, assume a jurisdiction to reform instruments, which, either by the fraud or mistake of the drawer, admit of a construction inconsistent with the true agreement of the parties. And, of necessity, in the exercise of this jurisdiction, a

So in *Probert v. Clifford*, which was the case of a joint covenant, by father and son, that the wife's jointure should continue 300*l.* a year, the covenant, being an executory agreement, was held to be evidence of the several engagements of both father and son; and heirs, being named, were bound as well as executors. In *Bishop v. Church*, Lord Hardwicke puts the case upon the ground, that, although the obligation was joint, yet the condition being "if they or either of them should pay," was evidence of a several agreement. Perhaps this view of these two cases is hardly to be supported, because it amounts to this, that, upon the whole instrument, at law, the agreement is joint, and in equity, several. In *Simpson v. Vaughan*, the condition was joint as well as the obligation, and the court proceeded upon the ground of mistake, simply. In these four cases, the bonds were filled up by one of the joint obligors, and there was no other evidence of mistake than the reasonable presumption arising from the general circumstances of the case, and the ignorance of the parties who filled up the bond. In *Bishop v. Church*, the bond was filled up by Bishop, the obligee.

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court of equity receives evidence of the true agreement in contradiction of the written instrument. [1] If the true agreement and the consequent mistake in the written instrument be established by the evidence, can a court of equity refuse relief, because it appears, that the party seeking relief himself drew the instrument; unless it be a principle in a court of equity, not to relieve a party against his own mistakes.

There is no such principle in a court of equity. Common mistake is the ordinary head of jurisdiction; and every party who comes to be relieved against an agreement which he has signed, by whomsoever drawn, comes to be relieved against his own mistake.

In *Bishop v. Church*, the bond was drawn by the obligee, in whose favor it was established to be several as well as joint. If, therefore, this instrument had been wholly drawn by the plaintiff, I should still have been of opinion, that the injunction must be continued.

\**WATERS v. MAYHEW and others.*

[220\*]

1822, 13th and 20th November, and 5th December;—*Plea of outlawry.—Practice.*

A plea of outlawry to which neither an office copy of the record of the outlawry, nor of the *capias utlagatum* was annexed, but only a certificate from the clerk of the outlawry, was held to be bad; but leave was given to amend it, because the defect was caused by a mistake of the clerk of the outlawries, and not of the defendant, and did not affect the substance of the plea.

THE bill in this cause prayed for an account of the money produced by the sales of certain real estates, which had been sold by the defendants, under a conveyance made to them, by the plaintiff, for that purpose. To this bill the defendant, Mayhew, put in the following plea:

"This defendant not confessing, &c. saith that the said complainant now is and standeth a person outlawed, and thereby disabled, by the laws of this realm, to sue or commence any action or actions, suit or suits in this honorable court, or in any other court, until the said outlawry be reversed by due course of law. For this defendant saith, that, on Monday next after the Feast of St. John, in the second year of the reign of his majesty King George the Fourth, the said complainant, by the name of Edmund Waters, late of the Haymarket in the county of Middlesex, Esq. was outlawed in an action of trespass on the case for 300*l.* at the suit of R. Hill, (as by the said outlawry, *sub pede sigilli*, hereunto annexed appeareth;) and further, that, on Monday next, after the Feast of All Saints, in the second year of the reign of his present Majesty, King George the Fourth, the said complainant, by the name of Edmund Waters, late of London, Esq. was outlawed in an action of trespass on

[1] Although there is nothing in writing to which the parol evidence may attach. *Alexander v. Creebie*, Lloyd & Goold, 145. As to the jurisdiction of chancery to correct mistakes in written instruments, vide *Amer. Ch. Digest*, Jurisdiction, XI.



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the case for 200*l.*, at the suit of Joseph Cooper, Joseph Watson, Thomas Osborne Stock, and Ford Wilson (as by the said last-mentioned outlawry, *sub pede sigilli*, hereunto also annexed appeareth) both of which said outlawries do yet stand and remain in full force and unreversed. And this [\*221] defendant doth aver that the \*said Edmund Waters, the complainant named in the said bill of complaint, and the said Edmund Waters named in the certificates of the said outlawries, *sub pede sigilli*, hereunto annexed, is one and the same person, and not diverse and several; and therefore this defendant doth humbly demand the judgment of this honorable court, whether or no he shall be compelled to make any other or further answer to the said complainant's bill of complaint, until the said complainant shall have reversed each and every of the said outlawries, and thereby become a person of ability and capable to exhibit a bill of complaint against this defendant; and in the mean time, this defendant prays to be dismissed, &c."

The following certificates were annexed to the plea :

" *London, June, 1821.*

" Edmund Waters, late of the Haymarket, in the county of Middlesex, Esq. outlawed in London, on Monday next after the Feast of St. John, before the Latin Gate, in the second year of the reign of King Geo. the 4th, at the suit of Richard Hill.

" R. HILL, (L. S.)

Case 300*l.*"

" Examined, John Young, deputy clerk of the outlawries."

" *London, November, 1821.*

" Edmund Waters, late of London, Esq., outlawed at the hustings of common pleas, held at the Guildhall in and for the city of London, on Monday next after the Feast of All Saints, in the second year of his present majesty, King Geo. the 4th.

[\*222] \* " At the suit of Joseph Cooper, Joseph Watson, Thomas Osborne Stock, and Ford Wilson.

" BEAVEN, (L. S.)

Case 200*l.*"

" Examined, H. Haines, clerk of the outlawry."

Mr. Hart, Mr. Bell, and Mr. Bridger, for the plaintiff:—Formerly it was usual to annex to a plea of outlawry the whole record of the outlawry under the seal of the court from whence it issued. Co. Litt. 128, b. Mitf. 184. But latterly it has been the practice to annex the *capias utlagatum* only, under the seal of the court. 1 Lutwyche, 6. Clift's Entries, 14. 5 Bac. Ab. 235. Here there is neither the record nor the *capias*; but there is only a certificate from the clerk out of the outlawries, that the plaintiff has been outlawed. It is necessary to have the *capias utlagatum* annexed; for that proves that the person against whom the process issued did not appear before the *exigent* was returned.

If this outlawry is improperly pleaded, the defendant cannot be permitted to

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 1822.—*Waters v. Mayhew and others.*


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amend his plea. Because this is a dilatory plea; and pleas of that kind are never allowed to be amended. There is reason to believe that the *capias utlagatum* has never been returned; and therefore this outlawry is incomplete.

Mr. *Heald*, for the defendant:—Outlawry is pleaded at law in the same way as it is pleaded in this case. The seal of the officer of the court, is the seal of the court; and this certificate is evidence that this record is complete. The outlawry is complete before the *capias utlagatum* is sued out; it is the foundation of the *capias*; and that writ is the fruit \*of the [\*223] outlawry, is given for the benefit of the subject after the outlawry is complete.

If it is necessary for us to have an office copy of the *capias sub pede sigilli*, it is not necessary to annex it to the plea. It may be produced in court, at any time. It is only said, in the books, that it is *usual* to annex it to the plea.

The VICE-CHANCELLOR:—This is a perfect plea of the outlawry. But that is not sufficient. There must be evidence of the fact. Formerly the office copy of the record was required to be annexed to the plea for that purpose. Afterwards an office copy of the *capias utlagatum* was considered sufficient. And the question is, whether the modern practice has established that a certificate from the clerk of the outlawries is equivalent to the *capias*. Let this plea stand over till the next day for hearing pleas and demurrers, and, in the mean time, let the register ascertain what is the practice of the court upon the subject, by referring to the records; and if it turns out that the *capias utlagatum* ought to have been annexed, I shall permit the plea to be amended; for the objection that has been raised extends to the form only of the plea, and does not affect the substance.

The plea was again called on; but no precedents had been found in support of the practice, as it had been stated by the defendant's counsel. Mr. *Heald* said, that he had received a certificate, stating that what was called the seal of the court was the seal of the officer of the court; and that the documents annexed to this plea, were the certificates usually given in cases of outlawry.

\*The VICE-CHANCELLOR:—I never can hold the outlawry in this [\*224] case to be properly pleaded, unless this manner of pleading it is shown to have become proper by inveterate practice. If that is not shown, I must hold this plea to be bad, for want of judicial evidence of the outlawry. But, as it would be hard that this defendant should be deprived of his rights by the mistake of the officer of the court to whom he applied, I shall permit him to move to amend his plea, on first giving notice of the motion to the plaintiff.

Mr. *Heald*, moved, that the defendant might be at liberty to withdraw his plea filed in this cause, and to amend it by annexing an office copy of the *exigent*, or record of the outlawry, upon which the plaintiff was declared an outlaw.

Mr. *Bell* opposed the motion and said, that a plea of outlawry was not a

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 1822.—*Waters v. Chambers.*


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plea to the merits of the case ; but the effect of it was only to suspend the cause until the outlawry was reversed ; and that it was the rule of the courts, never to give any indulgence to a plea which did not meet the merits of the case.

The VICE-CHANCELLOR :—If the defect of this plea had been caused by the negligence or inattention of the defendant, I would not have allowed him to amend it ; but that was not the case ; for this informality was occasioned by the error of a public officer to whom the defendant applied in order to do what was right upon the occasion. It is now found that the clerk of the outlawries was mistaken and I must, therefore, relieve the defendant from the error which he has been led into by the mistake of that public officer.

Motion granted.

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 [\*225]

\**WATERS v. CHAMBERS.*

1822, 14th December ; 1823, 20th March.—*Plea of Outlawry.—Practice.*

A defendant against whom an attachment was issued for want of an answer, may file a plea of outlawry.

IN this case, the defendant, Chambers, had put in a plea of outlawry after an attachment had issued against him for want of an answer. Mr. *Hart*, Mr. *Bell*, and Mr. *Bridger*, for the plaintiff now moved, that the plea might be taken off the file. They said that a plea of outlawry was a dilatory plea ; and that, upon the principle established by the case of *Curzon v. Lord De La Zouch*,<sup>(a)</sup> such a plea could not be filed by a defendant who was in contempt.

Mr. *Heald* and Mr. *Rose* opposed the motion.

The Vice-Chancellor said, that he had consulted the register, Mr. Walker, and was of opinion that a plea of outlawry might be filed after an attachment had issued.

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*SANDERS v. MURNEY.*

1823, 8th and 20th March, and 17th April.—*Plea and answer.—Practice.*

A defendant against whom an attachment with proclamations has issued, may put in a plea and answer, if the writ has not been returned, but cannot do so if the writ has been returned.

AN attachment with proclamations had issued against the defendant, for not putting in his answer to the bill. After the day on which the attachment with proclamations was returnable, the defendant put in a plea and answer, without having obtained the leave of the court for that purpose. It did not appear that the writ had been actually returned, before the plea and answer were filed.

Mr. *Lowndes*, for the plaintiff, now moved that the plea and answer [\*226] might be taken off the file. He said, \*that a defendant could not put

(a) 1 Swans. 186.

1823.—Hook v. Dorman.

in a plea and answer, after an attachment with proclamations had issued against him, without having previously obtained the leave of the court; and he cited Beames' Ord. Chan. 178. Gilb. For. Rom. 71, 72. "The reason why, upon the first contempt on the attachment, they allow a commission to issue, or a plea or demurrer to be put in, is because it does not appear to be an affected delay; and, therefore, upon tendering the costs of the attachment, the defendant may take his commission; and, upon like tender, the plea and demurrer are to be received. But, if there regularly issues an attachment with proclamations, the defendant cannot of course purge his contempt by a mere tender; but he must apply to the court to show that his plea and demurrer are proper, and to exhibit a proper excuse for his delay, that the court may see that there is no further likelihood of delay by the plea or demurrer put in, or by the commission to answer granted." *Lloyd v. Gunter*, (a) *Newton v. Dent*, (b)

Mr. Spence, for the defendant admitted, that, if the attachment with proclamations had been actually returned, the defendant could not have filed a plea and answer; but he said that the defendant was at liberty to file the plea and answer before the attachment with proclamations was returned.

THE VICE-CHANCELLOR:—I will consult the register about this motion. The question here is, whether, in order to make the proceeding which is complained of irregular, the attachment with proclamations must not be returned. In *Newton v. Dent*, the sheriff had returned *cepi corpus*.

\*The VICE-CHANCELLOR:—The question, whether this plea and [\*227] answer were regularly filed, depends on the orders of Lord Clarendon and Sir Harbottle Grimston; which express, "that, after a contempt duly prosecuted to an attachment with proclamation returned, no plea or demurrer shall be admitted, but upon motion in court." (c) This order is confirmed by the practice of the court, and by the case which has been cited from Dickens. If, therefore, this plea and answer were filed after the attachment with proclamations was returned, they are irregular; if before, they are regular. As it does not appear that the writ had been returned in this case, when the plea and answer were filed, I must hold them to have been regularly filed, and must refuse this motion. [1]

### HOOK V. DORMAN.

1823, 5th February, 30th April, and 5th May.—*Plea*.—*Demurrer*.

To a bill for the delivery of title deeds, and for an injunction to restrain the setting up of outstanding terms, to which no affidavit as to the title deeds was annexed, the defendant pleaded that there were no outstanding terms; plea overruled, because it ought to have been confined to so

(a) 1 Vern. 295.

(b) 1 Dick. 234.

(c) See Beames' Ord. Chan. 178.

[1] Vide *Foulkes v. Jones*, 274. A party in contempt, cannot apply to the court for a favor: *Johnson v. Pinney*, 2 Paige, 646.

1823.—Hook v. Dorman.

much of the bill as related to the outstanding terms, and because that part of the bill which related to the title deeds ought to have been demurred to, for want of the affidavit.

A defendant who has pleaded to a bill cannot demur *ore tenus* to it, on his plea being overruled ; because there is no demurrer on the record.

THE bill prayed that the defendant, Elizabeth Dorman, might be decreed to deliver to the plaintiffs possession of certain messuages and hereditaments, to account for the rents and profits, and to deliver up all the title deeds relating to the estate in question, or, otherwise, that the plaintiffs might be at liberty to proceed at law for the recovery of the estate, and that the title deeds [\*228] relating to it, in the possession of the defendant, might \*be produced at the trial of the action, and the defendant be restrained, by injunction, from setting up any legal estate or outstanding terms in bar of the action.

The case made by the bill was, that Charles Sharp being seised in fee of twelve messuages at Crayford, and of two houses at Dartford, in Kent, by his will, dated in 1772, devised six of these messuages (subject to an annuity) to his daughter Elizabeth Sharp, in fee, and the other six messuages to his daughter Sarah Sharp in fee ; and the two houses, to his daughters Elizabeth and Sarah, as tenants in common in fee. The testator died in 1775, and both his daughters survived him. Sarah Sharp married William Pope and Elizabeth married John Dorman. In 1779, William Pope and Sarah his wife concurred in levying a fine of the six messuages of which he was thus seised in her right, and a deed was executed by all necessary parties, by which it was declared that the fine should enure to the use of William Pope, and Sarah his wife, for their joint lives, and the life of the survivor, with remainder to the use of William Pope, his heirs and assigns for ever. In 1782, William Pope purchased from John Dorman, and Elizabeth his wife, their interest in the two houses at Dartford ; and, accordingly, in Hilary term 1782, John Dorman and Elizabeth his wife concurred in levying a fine of their interest in these two houses ; and by a deed executed by all the necessary parties it was declared that this fine should operate to the use of William Pope and Sarah his wife, for their lives, with remainder to William Pope, his heirs and assigns. The bill stated, that the plaintiffs were unable to set forth, more particularly, the contents of these deeds declaring the uses of the fines thus levied ; inasmuch as they were in the possession of the defendant. William Pope [\*229] died in 1786, and Sarah Pope in 1820. \*The plaintiff claimed, as the heir at law of William Pope, to be entitled to the six messuages at Crayford, and the two houses at Dartford ; but the bill alleged that Elizabeth Dorman, who had survived her husband, entered into possession of these messuages and houses immediately on the death of Sarah Pope in 1820, and also got possession of the deeds declaring the uses of the fines ; and that she now claimed to be entitled to these messuages and houses, as heir at law to her sister, Sarah Pope. The bill charged, that these deeds were still in the possession of Elizabeth Dorman ; and that, if they were produced, it would appear that the plaintiffs were entitled to the messuages and houses, but that E. Dorman refused to produce them ; and that she had procured certain terms of

1823.—*Hook v. Dormant*.

years in the property in question, created by Charles Sharp, the testator, or by some prior owner, and which had been vested in trustees to attend the inheritance, to be assigned to some person in trust for her; or that the legal fee was outstanding in some trustee, and that she threatened to set up either these terms, or the legal estate, in any action commenced by the plaintiffs to recover the possession of the property.

No affidavit as to the title deeds was annexed to the bill.

The defendant pleaded, to the whole of this bill, that no terms for years or legal fee in the messuages and premises mentioned in the bill, or any of them, were then subsisting or outstanding.

Mr. *Pepys*, for the plea:—This plea goes to the whole relief prayed by the bill, and therefore extends to all the discovery. This is a mere fishing bill; and it is plain that the allegation \*as to title deeds, is not the [\*230] circumstance on which the plaintiffs found their claims to relief. Admitting the case of *Barber v. Ray*,<sup>(a)</sup> yet it must be allowed that a defendant is exposed to great hardship, if a plea of this kind is not held to cover the whole bill; because the allegation of outstanding terms runs through the whole bill, and is the foundation of the equity claimed by the plaintiffs. Nor is this a case in which the defendant can split his defence, and demur to part of the bill and plead to the rest; because a demurrer admits the allegations to be true. At any rate, this plea may be allowed as to so much of the bill as seeks for relief against outstanding terms.

The Vice-Chancellor suggested, that the defendant might have demurred to so much of the bill as related to the title deeds, on the ground that no affidavit was annexed.

Mr. *Pepys* claimed the right to demur, *ore tenus*, to that part of the bill.

Mr. *Hart* and Mr. *Pemberton*, for the bill, insisted that the plea, though expressed to be a plea to the whole bill, extended, in fact, only to one part of the case, and left the allegation as to title deeds untouched, and therefore that it must be overruled.

The VICE-CHANCELLOR:—The plea insists that the single fact that there is no outstanding term, is an answer to the whole equity of the plaintiff's bill. This is plainly erroneous; for if the allegation be true, that the defendant has possession \*of the plaintiff's title deeds, that fact alone [\*331] would entitle the plaintiff to the whole relief and discovery sought by the bill. The defendant's counsel insist that they have a right to state, at the bar, in the nature of a parol demurrer, that the plaintiff has annexed no affidavit to his bill of the loss of his title deeds, and that he can, therefore, found no claim to the interference of a court of equity on that ground. But if it were true that such a parol demurrer would hold in this case, that would not make the plea good in form; for the language of the plea insists that the single fact that there is no outstanding term, is alone an answer to the whole equity

(a) 5 Madd. 64.

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 1823.—Packwood v. Maddison.
 

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of the plaintiff's bill, without reference to the additional circumstance that there is no affidavit annexed to the bill.

I am of opinion, however, that a parol demurrer will not hold in this case. Where a defendant puts in a written demurrer to a bill, he may assign, at the hearing, a new cause of demurrer by parol ;[1] but where there is a plea only, and no demurrer upon the record, he cannot demur by parol. The defendant here ought to have confined his plea to the whole discovery and relief sought by the bill, so far as it was founded upon the allegation of outstanding terms, and ought also to have demurred to the whole discovery and relief sought by the bill, so far as it was founded upon the allegation of loss of title deeds, because no affidavit was annexed.

Plea overruled.

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 [\*232]

\*PACKWOOD v. MADDISON.

1823, 11th and 19th February.—*Trustee.—Costs.*

A person to whom a legacy was assigned upon certain trusts, having filed a bill against the executors to recover the legacy, notwithstanding he had notice of a subsisting suit and decree for administering the assets, the court refused to allow the legacy to be paid over to him, because he had acted improvidently, or to give him his costs ; and it also refused to give the executors their costs, because they had answered the bill, instead of moving to stay proceedings in the suit.

ANN BRIMYARD, by her will, bequeathed to Mary, the wife of Edward Price, "the sum of 300*l.* to be secured by annuity for the support of Mary Price, and a further 50*l.* for her present use."

The testatrix died in 1820. Edward Price and Mary his wife, were indebted to Packwood, an attorney, in the sum of 28*l.* at the time of the death of the testatrix ; and, by an indenture, dated the 3d August 1821, and made between Price and his wife of the one part, and Packwood of the other part, after reciting the bequest of the 300*l.* and the debt of 28*l.* due to Packwood, and that Price was indebted to Packwood, for business done as his solicitor ; Price and his wife assigned all their interest in the 300*l.* to Packwood, in trust to place it out on proper security, in his name ; and, out of the dividends or interest, to pay himself the 28*l.* and any other sum due to him by them, to the extent of 100*l.*, together with all the costs of recovering or compelling payment of the 300*l.*, and, subject thereto, to pay the interest and dividends to Mary Price, for life, for her separate use, and after her death to her husband for life, and after the death of the survivor, to pay the interest to their children, share and share alike.

When this deed was executed, Packwood gave notice of it to the executors of Mrs. Brimyard, and filed the present bill, stating the legacy and the assignment to him on the trusts of the deed, and praying that the 300*l.* might be paid

[1] Vide, *Brinckerhoff v. Brown*, 6 Johns. Ch. Rep. 149. A plea cannot be substituted for a demurrer. *Evertson v. Ogden*, 8 Paige, 275.

1823.—Packwood v. Madison.

to him on these trusts; and in case the executors did not admit assets, that an account of the testatrix's estate might be taken in the usual \*manner, and, if necessary, that an account might be taken of what was [\*233] due to himself by Price and his wife.

This bill was filed by Packwood, and by Mrs. Price, by Packwood as her next friend, against Edward Price, the husband and his children (who were infants,) and also against the executors of Mrs. Brimyard.

The executors by their answer, stated, that immediately after the death of the testatrix, they had found it necessary, in consequence of some difficulties as to the construction of the will, to institute a suit for performing the trusts of the will; that a decree had been obtained for that purpose, before the present bill was filed, that Packwood had notice of the other suit and of the decree before he filed the present bill, and that he might have had the same benefit under it as he now prayed for. The 300*l.* was paid into court, under an order obtained on motion.

The cause now came on to be heard.

Mr. *Rose* for the plaintiff.

Mr. *Parker* for Price and his children.

Mr. *Latham*, for the executors, insisted that the present suit was wholly unnecessary, and that, by a petition in the former suit, the object of the plaintiff, might have been effectually attained, and a great deal of expense saved to the estate.

*The VICE-CHANCELLOR*:—The legacy, though for the support of the wife, is not to the separate use of the wife, and it passed by the assignment to the plaintiff Packwood. He is, \*therefore, entitled to be paid out [\*234] of the dividends what is due to him under the assignment; and the ordinary decree would be, to direct the master to ascertain how much is due to him. But I hope that the parties will find means to settle among themselves how much is due, and not aggravate the expenses already unnecessarily incurred by the expense of such an inquiry. I shall, therefore, direct the master to ascertain how much is due, in case the parties do not agree as to the amount. The executors, instead of putting in an answer to this bill, ought to have moved to stay proceedings in the suit, and thus have prevented an unnecessary expense; because they have not done so, I must refuse to give them their costs. I cannot give the plaintiff his costs; because the suit is unnecessary for the due execution of his trust; and I cannot allow the 300*l.* to be paid to him, because I consider him an improvident trustee. The fund must remain in court, and I shall direct the accountant-general, after satisfying out of the dividends what shall appear to be due to the plaintiff, to pay the residue of the dividends to the *feme covert* for her life, with liberty for the parties interested to apply at her death.



1823.—Wharton v. Wharton.

[\*235]

\*WHARTON v. WHARTON.

1823, 5th February.—*Pleading.*

A general answer, even where it includes an answer to all the particular charges, is insufficient; therefore where the bill asked, whether, on the marriage of W. a settlement of part of the property of M. was not executed, an answer that no settlement of any property was executed at the marriage of W. was held insufficient.

In this case the plaintiff excepted to the answer of the defendant for insufficiency. One of the interrogatories in the bill was, "whether, upon or subsequent to the marriage of Thomas Wharton, the intestate, with the defendant, Mary Wharton, some deeds or instruments, deed or instrument, by way of settlement, or otherwise, were not, or was not made and executed, whereby, or by means whereof property to a considerable, and what amount, and, amongst other property, part of the real estate of Miss Mitchell, was, or not, settled upon the defendant Mary Wharton, in lieu or in bar of dower of the said intestate's real estate, or how otherwise."

The answer was, "that the defendant denied that, upon or subsequent to the marriage of the said intestate with the defendant, Mary Wharton, any deeds or instruments, or deed or instrument, by way of settlement, or otherwise, were or was made or executed, whereby, or by means whereof, property to any amount was settled upon her, the defendant, in bar or in lieu of dower of the said intestate's real estate, as in the bill mentioned."

The master reported that this answer was sufficient, and the plaintiff excepted to the master's report. The exception now came on to be argued.

Mr. *Raithby*, for the exception, insisted on the rule, that a general answer to a particular charge is insufficient, and referred to Lord Bacon's [\*236] order on this point, \*Beames' Orders, 28, and also to Lord Clarendon's order, id. 179. Mitf. 250.

Mr. *Merivale*, for the defendant, argued that the question as to the sufficiency of such an answer must be decided on a view of the whole case; and that, if the court, or the master, should be of opinion, that the answer was such as to satisfy common sense, it would be considered as sufficient; if it were not so, the answer must often be impertinent. If the bill charged that a person died at a certain place, on a certain day, it must be a sufficient answer to state that the person was now living. *Hall v. Noyes*, (a) *Shepherd v. Roberts*, (b) and the other cases in which the rule, that a defendant must answer as to all the particulars charged, did not govern such a case as the present.

The VICE-CHANCELLOR:—It is true that the general answer in this case, includes in it an answer to the particular inquiry. But such a mode of answering may, in some cases, be resorted to, in order to escape from material dis-

(a) 3 Bro. C. C. 483.

(b) 3 Bro. C. C. 239.

1823.—Dix v. Reed.

covery ; and it is more safe to adhere in all cases, to the general rule, that particular charges must be answered particularly and precisely. [1]

Exception allowed

\*DIX v. REED.

[\*237]

1823, 11th February.—*Legacy to executor.*

Testator named two persons to be his executors, and bequeathed to them 50*l.* each, upon condition of their taking upon themselves a certain trust, and afterwards used these words, "I give to my cousin, T. K., 50*l.*, whom I appoint joint executor ;" and the testator also gave to T. K.'s sisters, legacies of 50*l.* each : Held, that the legacy to T. K. was not annexed to the office of executor, and that he was entitled to it, although he had declined to act in the trusts of the will.

THIS case was heard on an exception to the master's report ; and the question was, whether Thomas King was entitled to a legacy of 50*l.* reported to be due to him.

The suit was instituted for the purpose of establishing the will of Robert King Bird, and for an account of the testator's personal estate. The testator by his will expressed himself as follows : "To William Reed and John Baugley, I give 50*l.* each, whom I nominate and appoint executors in trust to this my will ; the said bequests to be upon condition of their taking upon them the trust hereinafter mentioned ; that is to say, I give, devise and bequeath unto my friends William Reed and John Baugley upon trust, for the use and benefit of my son Charles Clark Dix, all my freehold estate in the parish of Almondsbury, county of Gloucester, to hold to him, his heirs, executors and administrators." After giving various other legacies, the testator proceeds thus, "I give, unto my cousin Thomas King, the sum of 50*l.* whom I appoint as joint executor in trust in this my will." And in case of the death of Charles Clarke Dix, under twenty-one without issue, the testator devised the freehold estate in the parish of Almondsbury, to his cousin Thomas King, his heirs, executors, administrators and assigns, subject to an annuity of 30*l.* payable to Ann and Mary King, the sisters of Thomas King. In another part of the will, the testator gave them legacies of 50*l.* each.

\*Reed and Baugley proved the will, but King declined to prove it, [\*238] and never interfered in the execution of the trusts. It was, therefore, insisted, that he was not entitled to the legacy of 50*l.* The master having re-

[1] Vide *Amhurst v. King*, 2 Sim. & Stu. 183. *Woods v. Morrell*, 1 Johns. Ch. Rep. 103. *Methodist Episcopal Church v. Jaques*, 1 Johns. Ch. Rep. 65. *Van Cortlandt v. Beekman*, 6 Paige, 492. *Devereaux v. Cooper*, 11 Verm. Rep. 103. Where the defendant has no knowledge or information as to any of the facts stated in the bill he may deny generally, all knowledge or information of the same, without answering as to each charge separately, and may put the allegations of the complainant in issue by the general traverse at the conclusion of his answer. *Utica Ins. Co. v. Lynch*, 3 Paige, 210. Where a matter is expressly charged, in the bill, a denial according to the defendant's recollection or belief is insufficient. *Taylor v. Luther*, 2 Sumner, 228.

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1823.—Dix v. Reed.

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ported this legacy to be due, this exception was taken to that part of the report.

Mr. *Horne*, Mr. *Martin*, and Mr. *Rose*, in support of the exception, cited *Stackpoole v. Howel*,<sup>(a)</sup> *Read v. Devaynes*,<sup>(b)</sup> and the note to that case in Mr. Belt's edition of Brown's Chancery Reports. The testator seems to have united the two offices of executor and trustee; and a person who has assumed neither of these offices, cannot be entitled to a legacy, which must be considered as annexed to the office.

Mr. *Cooke* against the exception:—Thomas King did not take this legacy in his character of executor. In the bequest to the two first executors, who were strangers in blood to the testator, he expressly annexes the condition that they should execute a certain trust; but no such condition is annexed to the gift to Thomas King. On the contrary, the words used in giving the legacy to him are, "to my cousin, Thomas King." The motive of the gift was the relationship, and not the office; for Ann and Mary King, his sisters, who were related in the same degree to the testator, have legacies of the same amount; and Thomas King afterwards has a contingent interest devised to him in the real estate. The case of *Read v. Devaynes*, is also reported in Mr. [\*239] Cox's Reports; and it appears there, that when the cause came on for further directions, the court held the legatee to be entitled.

The VICE-CHANCELLOR:—I must hold that Thomas King is entitled to the legacy; and consider, that the gift is rather to be intended to be in respect of his relationship, than of his office. The circumstance that the two other executors have the same legacies, cannot be brought in aid of the exception; because those legacies are expressly annexed to the office of trustees of the real estate.

I consider the case, however, to be very doubtful. *Prima facie* legacies to executors are considered as annexed to the office, and they are to show circumstances to repel the presumption.[1]

Exception overruled.

(a) 13 Ves. 417.

(b) 3 Bro. C. C. 95. See the note to this case in Mr. Eden's excellent edition of Brown's Reports, and the cases there referred to, and S. C. 2 Cox, 285.

[1] "When a legacy is given to a person in the character of executor, so as to attach this implied condition to it, the question generally has been upon the sufficient assumption of the character, to entitle the party to the same. The cases establish the general rule that it will be a sufficient performance of the condition, if the legatee prove the will, with a *bona fide* intention to act under it or unequivocally manifest an intention to act in the executorship, as, for instance by giving directions about the funeral of the testator, but is prevented by death from further performing the duties of his office. But if an executor takes the office upon himself and by his subsequent conduct shows an intention not to execute the trusts, but to use the office as a means for enabling him to violate the confidence reposed in him by the testator, he will not be entitled or permitted to receive his legacy." *McCoun V. Ch. in Morris v. Kent*, 2 Edw. 175. In that case the legacy was given to the executor expressly for his care and attention. He at first declined to serve, whereby the estate, was put to the expense of an agent, but afterwards qualified; it was held that his legacy was subject to a deduction for the expenses fairly incurred by the appointment of the agent. The design

1823.—Duffield v. Elwes.

\*DUFFIELD v. ELWES.[1]

1823 12th February, and 28th June.

G. E. conveyed real estates upon trust for the benefit of his daughter ; but he declared that, if she married under age, and without his consent, the trustees should hold the estates in trust for him and his heirs. The daughter married under twenty-one, and without consent ; but G. E. was afterwards reconciled to her, and treated both her and her husband with great kindness : Held, that this conduct of the father did not divest the equitable fee which had vested in him on the marriage.

A mortgage, or a bond given as a collateral security for money due on mortgage, cannot be made the subject of a *donatio mortis causa*.

THIS suit was instituted for the purpose of having the rights and interests of various persons, under the settlement and will, made by the late George Elwes, declared by the court.

By a settlement, made in October 1802, George Elwes conveyed certain freehold and leasehold estates \*to trustees upon trust, in the [\*240] first place, to pay certain annuities to his wife, and to Emily Frances Elwes, his daughter and only child, and subject to those annuities upon trust, during the minority of his daughter, and until her coming of age, or her marrying with such consent as therein mentioned, to invest the rents of the settled estates in the public stocks, as an accumulating fund, to be laid out in the purchase of land to be settled to the same uses as were declared by this deed ; and after declaring certain trusts for the benefit of Emily Frances Elwes in case she attained the age of twenty-one years and was then unmarried, it was provided that, in case she should die unmarried in the life-time of George Elwes, or should marry under the age of twenty-one and without such consent as therein mentioned, then the trustees were to hold the estates in trusts for George Elwes and his heirs ; but in case she should, at any time, marry with the consent in writing of George Elwes, then the trustees, upon or before the marriage, were directed to settle the estates, together with that to be purchased by the accumulating fund, upon Emily Frances Elwes and the children of such marriage in strict settlement.

In February 1810, Emily Frances Elwes, being then, under, the age of twenty-one, was married, at Gretna Green, Scotland, to the plaintiff, Thomas Duffield, without the consent or knowledge of George Elwes, her father. Soon after the marriage, Mr. and Mrs. Duffield returned to London ; and, in conformity to a wish expressed by Mr. Elwes, were re-married in London, by banns. Soon afterwards, Mr. Elwes was reconciled to his daughter and her husband, and treated them with great kindness. He took them to reside with him in his own house, as part of his family, and treated them,

of the testator, to be collected from the will, is to govern the question, whether the executor is to take the legacy discharged from the implied condition. *Cockerell v. Barber*, 1 Sim. 23, before the V. Ch. whose judgment is given at length in S. C. 2 Russell, 585, and the decision affirmed by Lord Eldon.

[1] S. C. 1 Bligh's Rep. N. S. 530.

1823.—*Duffield v. Elwes.*

[\*241] \*in all respects, as having acquired those rights under the settlement to which they would have been entitled in case they had been married with his consent. Accordingly, Mr. Elwes, in September 1811, gave to Mr. and Mrs. Duffield possession of the mansion-house on the settled estate, together with a part of the lands, but retained possession himself of the greater part of them. He repeatedly declared that Mr. and Mrs. Duffield were entitled to the settled estates; and, in May 1816, he caused the title deeds of those estates to be delivered to Mr. Duffield, with the knowledge of the trustees. The deeds, from that time, continued in the possession of Mr. Duffield.

On the 2d of September 1811, Mr. Elwes died, leaving Mrs. Duffield his only child and heir-at-law, and having made his will, dated in March 1811, by which other estates were devised for the benefit of Mr. and Mrs. Duffield and their children; but nothing was said as to the settled estates.

In this suit, Mr. and Mrs. Duffield were the plaintiffs, and their children, together with the trustees of the settlement, the trustees and executors of the will, and the widow of Mr. Elwes, were the defendants. The plaintiffs insisted, by their bill, that they were entitled, under the settlement, and by the consent, conduct, and declarations of Mr. Elwes, to the settled estates.

Mr. Bell, Mr. Sugden, and Mr. Longley, for the plaintiffs, referred to the conduct of Mr. Elwes, as evidence of his subsequent approbation of the marriage; and mentioned those cases, in which, in the construction of wills, it had been held, that the subsequent approbation of a marriage was a sub-

[\*242] stantial compliance with \*the intention of testators, so as to entitle the parties to property devised to them in case they married with consent of executors. (a) The case of *Archer v. Pope*, (b) and *Pole v. Pole*, (c) were mentioned as cases in which trusts had been created or altered by the conduct of the parties.

Mr. Hart, Mr. Horne, Mr. G. Wilson, and Mr. Newland for the defendants.

The VICE-CHANCELLOR:—I cannot consider that the subsequent kind usage of the father proves his approbation of the marriage. But even his express approbation of the marriage could not divest the equitable fee; which, by the terms of the conveyance, vested in the father, upon the event of the prior marriage without his consent. [1]

The decisions in the case of wills have no application here. They proceed upon the principle that the intention of the testator is substantially complied with. But no such construction can be applied to this deed.

The father, by retaining possession of the great bulk of the settled estate, manifested that he did not consider the settlement as operative in favor of the

(a) See *Worthington v. Evans*, ante, 165, and the cases there cited.

(b) 2 Ves. 523.

(c) 1 Ves. 76.

[1] Vide *Long v. Ricketts*, 2 Sim. & Stu. 179. *Wells v. Smith*, 2 Edw. 78. *Clifford v. Beaumont*, 4 Russ. 325.

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daughter. But even if he had, by mistake, considered the daughter entitled under the settlement, the property would not have been found by it, without a new conveyance to that effect.

\*In this case, another question arose and was decided by the court, [\*243] as to the validity of a *donatio mortis causa* of certain mortgages.

George Elwes was possessed of a bond for 2,927*l.* and had, also, a mortgage, created by a deed of even date with the bond, for securing the sum mentioned in the bond. And he had another mortgage for 30,000*l.* On the 1st of September 1821, when he was on his death-bed, so ill as to be unable to write, but of sound and disposing mind, in the presence of three persons as witnesses, he declared that he gave the bond, and mortgages, and the money secured by them, to his daughter Mrs. Duffield. A written statement of this declaration was forthwith made and signed by the three persons in whose presence the declaration was made. Very soon afterwards, on the same day, and in presence of the same persons, the mortgage deeds and bond were produced to the testator, and he was told what they were; on which he desired them to be delivered into the hands of Mrs. Duffield. They were, accordingly delivered into her hand; and, whilst she held the deeds, he took her hands between his, in token of having completed the gift, and expressed satisfaction when he had done so. He died on the following day.

It was insisted, by the bill, that these mortgages and the bond passed, by this gift, to Mrs. Duffield, as *donationes mortis causa*.

Mr. Bell, Mr. Sugden, and Mr. Longley, for the plaintiffs:—It is decided that a bond will pass as a *donatio mortis causa*. *Snellgrove v. Bailly*,(d) *Gardner v. Parker*.(e) The gift of a paper containing a \*cove- [\*244] nant, is a gift of money secured by the covenant, because it deprives the party of the means of suing for it. In the case where the bond accompanies a mortgage, and both the bond and the mortgage deed are delivered, the bond draws with it the mortgage. In such a case, the person to whom the gift of the mortgage is made would be entitled to retain the deeds, and no court of equity would compel them to be delivered up, or allow any other party to proceed as if the mortgage deeds were lost. As money which is secured by a bond, passes by the delivery of the bond, as a *donatio mortis causa*; so the delivery of the mortgage deeds, for the same purpose, must be considered to have the same effect; and, as the right to make the debtor liable passes with the delivery of the bond, so the right to make the land liable, passes by the delivery of the mortgage deeds. As in the case of the *Duchess of Buccleuch v. Hoare*,(f) it was held, that the heir at law of a testator held Scotch heritable securities as a trustee for a legatee under the will; so it should be held, in the present case, that there was a trust in favor of the donee *mortis causa*. *Ward v. Turner*,(g) and *Richards v. Symes*,(h) in which

(d) 3 Atk. 214.

(g) 2 Ves. 431.

(e) 3 Madd. 184.

(h) 2 Atk. 319. Barnard. 90.

(f) 4 Madd. 467.

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it was held that the delivery of the deeds by the mortgagee to the mortgagor, cancelled the debt.

The VICE-CHANCELLOR :—The case of a bond I consider to be an exception, and not a rule. Property may pass without writing, either as a *donatio mortis causa*, or by a nuncupative will, according to the forms required by the statute. The distinction between a *donatio mortis causa*, and a nuncupative will is, that the first is claimed against the \*executor, and the other, from the executor.(i) Where delivery will not execute a complete gift *inter vivos* it cannot create a *donatio mortis causa*,[1] because it will not prevent the property from vesting in the executors; and, as a court of equity will not, *inter vivos*, compel a party to complete his gift, so it will not compel the executor to complete the gift of his testator. The delivery of a mortgage deed cannot pass the property *inter vivos*; first, because the action for the money must still be in the name of the donor; and secondly, because the mortgagor is not compellable to pay the money without having back the mortgaged estate, which can only pass by the deed of the mortgagee; and no court would compel the donor to complete his gift by executing such a deed.

As to the case where a bond accompanied the mortgage deed, I was at first inclined to think that, as the bond alone, if it had been the only security for the debt, would under the decisions, have passed as a *donatio mortis causa*, so it would draw after it the mortgage, as being a collateral security for the same debt; but, upon further consideration, I think that the delivery of the bond, where there is also a mortgage, cannot be considered as a gift completed. The mortgagor has a right to resist the payment of the bond, without a re-conveyance of the estate; and it cannot be maintained that the donor of the bond would be compelled to complete his gift by such re-conveyance. The case of the *Duchess of Buccleuch v. Hoare*, where I held, that a gift by will of an English bond was a gift also of a Scotch heritable security for the same debt, does not apply to this case. There the single [\*246] question was, \*whether the gift of the English bond was not, within the intention of the testator, a gift of the debt, and did not necessarily carry with it all securities for the debt. The question here is, not as to the intention to give, but whether the gift be completed. I think the gifts were not completed; and must declare, that there was no good *donatio mortis causa*

(i) It is said in 3 P. W. 356, that a *donatio mortis causa* operates as a declaration of trust upon the executor.

[1] It is of the essence of a *donatio mortis causa*, that the gift shall be proved to have been made in contemplation of the donor shortly terminating life by reason of extreme sickness, or extreme old age. The thing must be given with the intention that, in case the donor should recover, it shall be restored to him; *Edwards v. Jones*, 7 Sim. 325. A mere assignment of a bond, in writing, with delivery to the assignee, without other circumstances, is merely an incomplete gift, and not a *donatio mortis causa*; *Edwards v. Jones*, 1 Mylne & Craig, 226.

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 1823.—Bland v. Winter.
 

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of these mortgages, even in the case where the mortgage was accompanied by a bond.[1]

### BLAND v. WINTER.

1823, 21st February.—*Bond.—Parties.*

To a bill filed by an obligee of a joint and several bond for payment of his debt, all the obligors must be made parties.

THIS bill was filed by the obligee of a joint and several bond, against the personal representatives of one of the obligors, for an account of assets, and to obtain payment of the bond. The other obligor was alive, but was not made a party to the suit; and, when the cause came on to be heard, the question was, whether the other obligor ought not to have been made a party.

The plaintiff, Susannah Bland, on the 6th March, 1803, was possessed of the sum of 925*l.* three per cents, which, on that day, she transferred to Robert Winter, the younger by way of loan, on his father, Robert Winter, the elder, agreeing to join with him in executing a bond to the plaintiff, to secure the re-transfer of that sum. Accordingly, Robert Winter, the elder, and Robert Winter, the younger, on the same day, executed a joint and several bond to the plaintiff for 1,200*l.* conditioned for the re-transfer of the 925*l.* three per cents, on the 6th March, 1809, and for payment, until the re-transfer, of interest equal to the dividends on the stock, at such times as the dividends would have been payable.

\*Robert Winter, the elder, after the execution of this bond, conveyed [\*247] away the greater part of his real and personal estate to his son, the defendant, William Leyton Winter, and died in 1820, having made his will, by which he bequeathed all his estates, real and personal, to the defendant, William Leyton Winter, and made him sole executor. The testator's personal estate was insufficient for the payment of his debts; and the bill sought to set aside the conveyances to the defendant, as fraudulent. The answer denied the validity of the bond, as against Robert Winter, the elder.

The cause now came on to be heard, and in support of the objection before mentioned, Mr. *Horne* and Mr. *Pemberton* contended, that the object of this suit being to make the assets of Robert Winter, the elder, liable, and the bond being joint and several, Robert Winter, the younger, ought to have been a party; because he had a manifest interest in the defence of the suit, and because it was the interest of the present defendant that he should be made a party. For if the plaintiff was entitled in equity, to have the bond paid, the present defendant was entitled to call upon Robert Winter, the younger, to pay his proportion. If it were the case of a surety, it is quite clear he must

[1] As to *donatio mortis causa*, generally, and *donatio mortis causa* of a bond, see *Edwards v. Jones*, 7 Sim. 225.



1823.—*Adamson v. Hull.*

have been made a party. It is laid down expressly, in *Cockburn v. Thompson*,<sup>(a)</sup> that the general rule is, that a plaintiff suing on a joint and several bond, must make all the obligors parties, and that the only exception is, where a co-obligor is a mere surety, and insolvent, or where the demand must be restrained to the principal. *Madox v. Jackson*,<sup>(b)</sup> is to the same effect; [\*248] and the same rule is there laid down, though that case \*was decided on particular circumstances. It is true that *Collins v. Griffith*,<sup>(c)</sup> is a case where a different doctrine was held. But in *Angerstein v. Clarke*,<sup>(d)</sup> Lord Thurlow had occasion to consider both those cases, and he adhered to the decision in *Madox v. Jackson* thereby overruling *Collins v. Griffith*. The present is a much stronger case.

Mr. Bell and Mr. Combe, for the plaintiff:—

It cannot be held that the co-obligor is a necessary party in this case. This is a mere action at law turned into a bill in equity for the administration of assets. *Haywood v. Ovey*,<sup>(e)</sup> and *Collins v. Griffith*,<sup>(f)</sup> and the cases mentioned in 1 Eq. Ca. Abr. 93, are authorities to show that the objection now taken, that Robert Winter, the younger, is a necessary party to this suit, is not valid, and ought not to prevail.

The Vice-Chancellor ruled, that co-obligors, being all principals, must be brought before the court upon a bill by the obligee.[1]

[\*249]

## \*ADAMSON V. HULL.

1823, 14th and 28th February.—*Practice.—Abatement.*

Where one of two or more plaintiffs dies before an answer is put in, the suit is abated, and the defendant cannot move that a supplemental bill be filed within a limited time, as in the case of a plaintiff becoming bankrupt.

THERE were two plaintiffs in this case; and, before the answer was filed, one of them died. The defendant now moved, that the surviving plaintiff might be ordered to file a supplemental bill within a limited time, in order to bring before the court the personal representative of the deceased plaintiff, and, in default of his so doing, that the bill might be dismissed.

Mr. Pemberton, for the motion, stated that the defendant could not file his answer to the bill, because the suit had abated by the death of one of the plaintiffs; nor could he move to dismiss the bill for want of prosecution, because the

(a) 16 Ves. 326.

(d) 2 Dick. 738.

(b) 3 Atk. 406.

(e) 6 Madd. 113.

(c) 2 P. W. 313.

(f) 2 P. W. 313.

[1] See vide Story's Eq. Plead. 138. If one co-obligor is dead, it is only necessary to make the surviving obligor a party. *Valentine v. Farrington and others*, 2 Edw. 53. It is not necessary to make all the joint debtors, against whom a judgment was obtained, parties defendant to a creditor's bill, provided it distinctly appears in the bill, that those who are not joined in the suit are wholly insolvent and destitute of property. *Van Cleef v. Sickles*, 5 Paige, 505; 8 C. & Edw. 322.

1823.—Green v. Otto.

answer was not filed. The whole suit was abated by the death of one of the plaintiffs.

Mr. Koe opposed the motion, as being contrary to the practice of the court.

The register, (Mr. Walker,) being referred to, said, that the whole suit was abated by the death of one of the plaintiffs; and that on inquiry he had been unable to find any precedent for such an order as that now moved for.

The Vice-Chancellor, therefore, refused the motion. [1]

## \*GREEN V. OTTE.

[\*250]

1823, 10th February.—*Equity of a feme covert against her husband's assignees.*

A divorce obtained by a wife after her husband's bankruptcy does not entitle her in equity to the whole of a fund bequeathed to her, which came into possession after the bankruptcy; although no settlement was made upon her at her marriage, and her husband at that time received 1,500*l.* stock in her right.

Upon a reference to the master to approve of a proper settlement upon the wife, out of a fund accruing in her right, which was claimed by the assignees of her husband, the court directed the master to have regard to the extent of the fortune received by her husband in her right, as well as to any other settlement which he might have made on her.

THIS was a bill, by the assignees of a bankrupt, for payment of a legacy to which the bankrupt was entitled, in right of his wife, but the whole of which the wife claimed.

Mary Khuff, who died in November 1813, bequeathed to trustees the sum of 4,000*l.* four per cent, bank annuities, upon trust, to pay the dividends to Elizabeth Duncan for life, and on her death to pay 3,000*l.*, part of the 4,000*l.* to the testatrix's niece, Susannah, the wife of James Maund, "to become her's absolutely." The trustees paid the dividends to Elizabeth Duncan accordingly. In February 1820, a commission of bankrupt issued against James Maund, and the plaintiffs in this suit were the assignees of his estate. In May 1821, Elizabeth Duncan died. This bill was filed in consequence of the trustees refusing to transfer the 3,000*l.* to the assignees, and in consequence of Susannah Maund, the wife of the bankrupt, claiming to be entitled to it for her separate use. The bill charged, that a sufficient provision was made for Susannah Maund, and that Elizabeth Duncan had bequeathed to her the residue of her estate for her separate use, and that this residue was of the value of 3,000*l.*

Mrs. Maund insisted, in her answer, and proved by evidence in the cause, that she had married the bankrupt in 1805, being then only eighteen

[1] Reversed, Turner & Russ. 258, and motion granted. On a death of a party, if the cause survive to or against some other of the parties, so that a perfect decree as to every part of the subject of litigation can be made between the surviving parties, the suit does not abate as to the survivors; and on motion of either party, the court will order the suit to proceed between the parties. *Leggett v. Dubois*, 2 Paige, 211. For American cases on the subject of abatement, vide Amer. Ch. Digest, Practice, I. 11.

1823.—Green v. Otte.

years of age, and entitled to 1,500*l.* three per cent stock, which was [\*251] \*transferred to Maund on the marriage; that no settlement had been made upon her; that in December 1821 she obtained a decree of divorce against her husband in the ecclesiastical court, on the ground of adultery and ill treatment; that a disease was communicated to her by her husband soon after the marriage, under which she labored for many years, and by which her health was now so much impaired, that she required frequent medical advice and attendance; and that, on account of her husband's bankruptcy, she was unable to obtain from him any allowance for her maintenance. She admitted that her mother had bequeathed some property for her separate use, but denied that it was to the amount of 3,000*l.*; and insisted that the 3,000*l.*, which she now claimed in addition to the property to which she was entitled under the will of her mother (and which, it appeared, did not produce above 16*l.* a year,) was necessary for her maintenance. There was no issue of the marriage, and the proceedings for the divorce were commenced after the bankruptcy.

Mr. *Heald* and Mr. *Wakefield*, for the plaintiffs, suggested that the proceedings in the ecclesiastical court, which were not commenced until after the bankruptcy, were collusive, for the purpose of founding the claim now made by the wife. As this legacy was not given to the separate use of the wife, there is nothing in the case to distinguish it from the class of cases which establish the doctrine, that the wife is not entitled, as against the assignees of her husband, to have the whole of a fund which falls into possession in her right after the bankruptcy; but is only entitled to have a portion of the fund settled on her. All the leading cases were examined in the case of *Beresford v.*

*Hobson.*(a)

[\*252] \*Mr. *Parker* for the bankrupt.

Mr. *Girdlestone* for the trustees.

Mr. *Bell* and Mr. *Pemberton* for the wife:—This is one of those cases in which the facts are so strong, as to exclude the husband or his assignees from any claim to the fund. The wife being an infant at the time of the marriage; no settlement made upon her; all the property to which she was then entitled paid over to her husband, and spent by him; the treatment she has received from her husband; the state of her health; her being now actually divorced from him on account of his conduct, and having no adequate provision for her maintenance—are such facts as must distinguish this from the other cases. In *Oxenden v. Oxenden*,(b) the court, on the ground of the cruelty and misconduct of the husband, decreed the whole interest of a fund to the wife, for her maintenance. The same thing was done, for the same reason, in *Williams v. Cullow*.(c) In *Watkins v. Watkins*.(d) the same principle was acted upon

(a) 1 Madd. 362.

(b) 2 Vern. 493. S. C. Pre. Cha. 239.

(c) 2 Vern. 752. See also *Nicholls v. Danvers*, 2 Vern. 671, in which case there had been proceedings against the husband in the ecclesiastical court, *propter sevitiam*.

(d) 2 Atk. 96.

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although the charge of adultery was retorted against the wife. *Wright v. Morley*,<sup>(e)</sup> *Guy v. Pearkes*,<sup>(f)</sup> and *Atherton v. Nowell*,<sup>(g)</sup> are cases in which the court has maintained the same doctrine.

The Vice-Chancellor said he was of opinion, that if separation and divorce from the husband could, in any case, give a special equity to the wife, it would not affect this case; because the whole proceeding was \*sub- [\*253] sequent to the bankruptcy, and, consequently, after the right to the legacy had vested in the assignees; and that there must be a decree for a reference to the master to approve of a proper settlement upon the wife.

A question was afterwards raised, whether, in the decree for a reference to the master to approve of a proper settlement to be made upon the wife out of the 3,000*l.*, there should be a direction to the master to have regard to any other property which the husband might have possessed in right of his wife?

*Mr. Bell* and *Pemberton*, for the wife, insisted that there should be such a direction. It appeared in evidence, that the husband had on the marriage received 1,500*l.* stock belonging to the wife, and had made no settlement upon her. Under such circumstances she might be held entitled either to the whole of this fund, or to a more considerable share than would otherwise be settled upon her. The court is always influenced by such circumstances as to the amount of the fund to be settled. *Bond v. Simmons*.<sup>(h)</sup>

*Mr. Heald* and *Mr. Wakefield*, for the assignees, argued that there ought to be no such direction in the decree, and cited *Mitford v. Mitford*,<sup>(i)</sup> *Murray v. Elibank*.<sup>(k)</sup> *Beresford v. Hobson*,<sup>(l)</sup> *Burdon v. Dean*.<sup>(m)</sup>

The VICE-CHANCELLOR:—Upon a reference to the master to approve of a proper settlement upon the wife out of a particular property, it is always usual to direct the master to have regard to \*any settlement [\*254] which the husband may have made upon the wife, *aliunde*. If the extent of the provision for the wife out of the particular property in question, is to be affected by any prior settlement of other property made by the husband, it necessarily follows that regard must also be had to any other property possessed by the husband in right of the wife. For the prior settlement may not be adequate, or more than adequate, to the equity of the wife in respect of the other property possessed in her right. The cases of *Bond v. Simmons*, and *Elibank v. Montolieu*,<sup>(n)</sup> are authorities, that regard must be had to the extent of the wife's fortune. Let it be referred to the master to approve of a proper settlement, regard being had to the extent of the wife's fortune, and to any settlement which may already have been made upon her.

(e) 11 Ves. 12; and see *Roper on Husband and Wife*. 1st Vol. 275.

(f) 18 Ves. 196.

(g) 1 Cox 228.

(h) 3 Atk. 20.

(i) 9 Ves. 87.

(k) 10 Ves. 84.

(l) 1 Madd. 361.

(m) 2 Ves. jun. 607.

(n) 5 Ves. 741. The decree in that case directed a reference to the master to approve of a proper settlement upon the wife and children, "regard being had to the extent of her fortune and the settlement already made upon her."

1822.—Fielden v. Fielden.

[\*255]

## \*FIELDEN v. FIELDEN.

1822, 6th and 12th December.—*Injunction*.—*Executor*.

After a decree for the administration of assets, the executor pleaded a false plea to an action brought against him by a creditor of the testator, in order that he might have an opportunity to apply for an injunction to restrain the action; the court granted the injunction, and held, that the creditor was not entitled to a judgment against the executor *de bonis propriis*.

THIS suit was instituted by the executors of Joshua Fielden, deceased, to have his personal estate applied in a due course of administration. After the bill was filed two actions were brought against the executors, one by a bond creditor, and the other by a simple-contract creditor, of the deceased, to recover their respective debts. After the decree had been made, the executors pleaded to the former action, *plene administravit* and *non est factum*, and, to the latter, *non assumpsit*.

Mr. Wilbraham for the plaintiffs, moved for an injunction to restrain the creditors from proceeding in their actions, on the ground that a decree had been obtained in this court for the administration of the testator's estate.

Mr. Spence, for the creditors:—The executors, instead of giving notice of this decree, have pleaded, to the actions, pleas which the creditors undertake to falsify; and they will then be entitled to judgment against them, *de bonis testatoris, et si non, de bonis propriis*, and, therefore, the court will not restrain them from proceeding in their actions. *Terrewest v. Featherby*, (a) *Brook v. Skinner*, mentioned in the note in that case.

Mr. Wilbraham, in reply, said, that the law was mistaken in the argument in *Terrewest v. Featherby*, and referred to *Harrison v. Beccles*, a case [\*256] before Lord Mansfield, as cited and approved by Lord Kenyon, in *Erving v. Peters*; (b) and also to Serjeant Williams' note to *Hancock v. Prowd*, (c) and he added that these authorities showed, that an executor who pleaded *plene administravit*, was liable only to the extent of assets of the testator come to his hands.

The Vice-Chancellor ordered this motion to stand over, with liberty to the executors to make such affidavit as they should be advised.

An affidavit was made by the executors' solicitor, stating, that, when he instructed his pleader to draw pleas to the actions at law, he informed him that the object in pleading to them was, to give effect to the decree, by preventing the plaintiffs at law from obtaining judgments before an injunction could be obtained in aid of the purposes of the decree; that the pleas of *plene administravit* and *non est factum*, were pleaded for the purpose of giving effect to the decree, and without any particular instructions to plead the same, and through inadvertence, and with a view only of giving effect to the decree; and that he never received any instructions from the executors to plead those pleas.

(a) 2 Meriv. 480.

(b) 3 T. R. 688.

(c) 1 Saund. 336.

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 1830.—Hawkins v. Shewen.
 

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The VICE-CHANCELLOR :—I consider the law now to be settled according to the doctrine laid down by Lord Mansfield, in the case of *Harrison v. Beccles*.

In this case it appears, from the affidavit, that the executors gave instructions to their solicitor to plead to the action, merely for the purpose of giving them time to apply to this court; and that the plea of *plene administravit* was a mere form adopted by the solicitor \*without communication [\*257] with his client. And, for that reason alone, I should have protected the executor according to the decision of Lord Eldon, in the case of a judgment by default submitted to, merely with the view to apply to a court of equity.(d)

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#### HAWKINS v. SHEWEN

1823, 7th March.—*Descent*.

Where a person seized of an estate by descent *ex parte materna*, dies without issue, the descendants of his maternal grandfather must all be extinct before any descendant of a remoter maternal ancestor can inherit, however nearly related to the *propositus*, *ex parte paterna*.

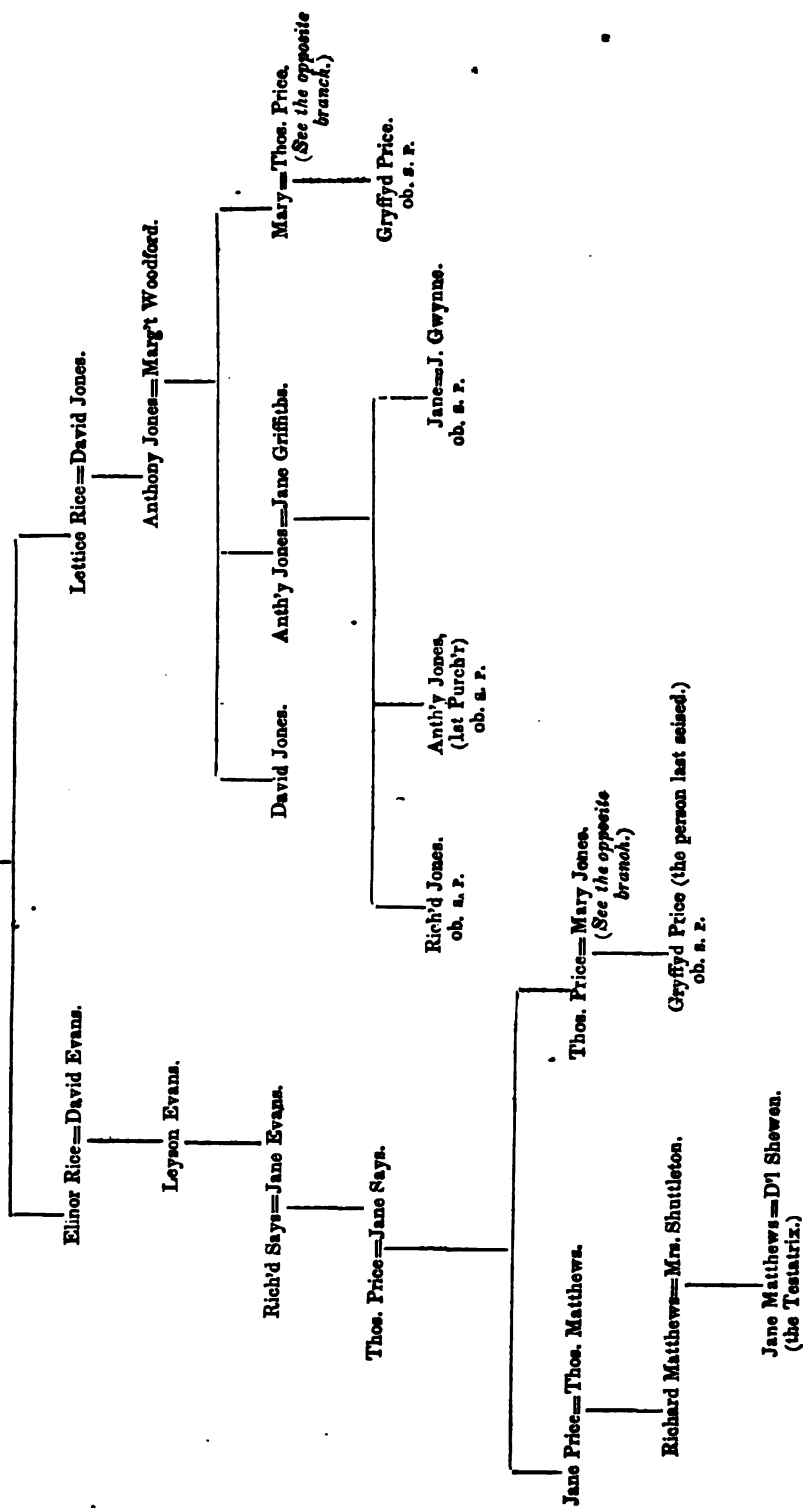
THIS suit was instituted for the purpose of having the trusts of Jane Shewen's will carried into execution under the decree of the court.

By the decree made at the hearing of the cause, the real estates of the testatrix were ordered to be sold in lots. At the sale, one of the lots was purchased by Richard Kirkham. An order was obtained, directing a reference to the master to inquire whether a good title could be made to this lot. The master reported, that a good title could not be made to it, inasmuch as Mrs. Shewen claimed by descent from Anthony Jones, the first purchaser, through Sir Walter Rice her ancestor, and Lettice Rice his daughter, who married David Jones, without showing that the blood of David Jones, who was the father of Anthony Jones, who married Margaret Woodford, was extinct.

Mrs. Shewen's pedigree was as follows :—

(d) The case here alluded to is *Dyer v. Kearsley*, 2 Mer. 482. [See further *Lord v. Wormleighton*, Jacob, 148. *Price v. Evans*, 4 Sim. 514. *Kent v. Pickering*, 5 Sim. 569.]

# SIR WALTER RICE.



1823.—Hawkins v. Shewen.

\*The plaintiffs excepted to the master's report.

[\*259]

Mr. Bell, Mr. Sugden, and Mr. John Wilson, in support of the exception.

This estate has always past by descent since the time of Anthony Jones, the first purchaser. Mrs. Shewen certainly had a good title by descent, for she was heir at law to G. Price, *ex parte paterna*, and had also in her the blood of his mother Mary Jones. The master objects to the title, because David Jones might have had other descendants besides Anthony Jones who married Margaret Woodford. Lord Hale, in his Hist. Com. Law, 2 vol. 120, says:—"The last actual seisin in any ancestor makes him, as it were, the root of the descent, equally, to many intents, as if he had been a purchaser; and, therefore, he that can not, according to the rules of descents, derive his succession from him that was last actually seised, though he might have derived it from some precedent ancestor, shall not inherit." And again he says, page 127:—"If the son purchases lands and dies without issue, and it descends to any heir of the part of the father; then, if the line of the father, after entry and possession, fail, it shall never return to the line of the mother; though in the first instance, or first descent from the son, it might have descended to the heir of the part of the mother; for by this descent and seisin, it is lodged in the father's line, to whom the heirs of the part of the mother can never derive a title as heir, but it shall rather escheat." We admit that Gryffyd Price took by descent from his mother, Mary Price; but she was related to Anthony Jones, the first purchaser. Now, in collateral descents, it is not necessary that the claimant should prove himself to be heir to the first purchaser; it is sufficient if he can show himself to be of the blood of the first purchaser, and the \*nearest collateral relation of the person last seised. [\*260] "It is not necessary that he that inherits be always heir to the purchaser. It is sufficient if he be of his blood, and heir to him that was last seised." 2 Hale's C. L. 122. Mrs. Shewen was the nearest collateral relation of the whole blood of Gryffyd Price, and she was also of the blood of the first purchaser. No relation of David Jones can be so near a collateral relation of Gryffyd Price as she was; and, therefore, it is no objection to her title if there are other descendants of David Jones living; for they can never be the nearest collateral relations of the whole blood of Gryffyd Price. The effect of the descent and seisin in the paternal line, is to exclude a whole line of descendants, who would have been heirs if they had not been intercepted by that descent and possession; and, in this case, to cut out the line of Mary Price entirely.

Mr. Treslove, for the report, contended, that in order to show that Mrs. Shewen was heir at law to Gryffyd Price, it was necessary to prove that the issue of David Jones, who married Lettice Rice, was extinct; and added, that it had been proved that D. Jones had had another son, besides the Anthony Jones who married Margaret Woodford, and that that son had issue.



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 1823.—Williams v. Davis.
 

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The VICE-CHANCELLOR:—The proposition stated at the bar, that the testatrix had a good title, because she was the nearest collateral relation of the whole blood of G. Price, who was last seised, and was of the blood of the first purchaser, is merely fallacious. In order to constitute a good title, the party must be the nearest collateral heir of the whole blood of the person last seised on the part of the ancestor through whom the estate descended.

[\*261] When \*Lord Hale speaks of the nearest collateral relation of the whole blood of the person last seised and of the blood of the first purchaser, he means the latter branch of the expression as a qualification, and not an addition to the first branch, that the collateral heir of the whole blood must claim through the ancestor from whom the estate descended, and thus be of the blood of the first purchaser. If this estate had descended to G. Price, *ex parte paterna*, then the testatrix would have been his nearest collateral heir of the whole blood; for the question would then have been, who was heir to his father? But as this estate descended from the mother, the question is, who is the nearest collateral heir of the whole blood, *ex parte materna*? and the blood of David Jones, the grandfather of the mother, must necessarily inherit to her before the blood of Lettice Jones, the grandmother of the mother, through whom the claim must be made for the testatrix.

Overrule the exception.

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[\*262]

\*WILLIAMS v. DAVIS.

1823, 8th March.—*Practice.—Injunction.*

An order to dissolve an injunction *nisi*, obtained after exceptions filed to the answer, is irregular.

In this case, the common injunction had been obtained, for want of an answer. On the 21st of February, the answer was filed. The plaintiff took exceptions to it; and on the 26th of February, delivered them to the defendant's clerk in court. On the next day, which was a seal-day, the defendant obtained the common order to dissolve the injunction, *nisi*.

Mr. Treslove, for the plaintiff, now moved to discharge that order, for irregularity, on the ground that it had been obtained after exceptions to the answer had been taken and delivered to the defendant's clerk in court; and he said, that the order to dissolve an injunction, *nisi*, alleges, that the defendant has put in a full and perfect answer to the bill.

The Vice-Chancellor, under these circumstances, held that the order was irregularly obtained, and granted the motion.[1]

[1] Vide *Smith v. Thomas*, 2 Dev. & Batt. (N. Car.) 126; *Hewes v. Hewes*, 1 Beav. 179.

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1823.—Harris v. De Tastet.

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\*HARRIS v. DE TASTET.

[\*263]

1823, 27th February and 18th March.—*Practica.*

The master's certificate of disobedience to a decree, directing deeds, papers and writings to be produced before him, need not be filed within four days after it is signed ; it is sufficient if it be filed before the four-day order is delivered out.

AN order, made in this cause, for certain inquiries to be made by the master, contained the usual direction that the parties should produce, before the master, upon oath, all books, papers and writings, in their custody or power, relating to the subjects of the inquiries. The defendant having refused to comply with that direction, the master, on the 20th of December 1832, granted his certificate of the defendant's refusal. On the same day, the plaintiff obtained the common order for the defendant to produce the books, papers and writings before the master, within four days after personal notice of the order to his clerk in court. The certificate was not filed until the 9th of January 1823, nor was the order delivered out by the registrar, until the 11th of February following. On the next day, the plaintiff served the order on the defendant's clerk in court.

Mr. Bell, for the defendant, moved to discharge the order, on the ground, that by an order of the 29th of October 1692, (Beames' Orders, 292,) the certificate ought to have been filed within four days after it had been signed by the master, and that the four-day order ought not to have been obtained before the certificate was filed.

Mr. Pemberton, for the plaintiff, said that the present practice was to date the certificate and four-day order on the same day, so as to leave no interval between them for the party to obey the decree, and to file the certificate afterwards ; but not to proceed upon the four-day order until after the filing of the certificate ; \*and that the register never, in fact, delivered out [\*264] the order until the certificate had been filed, and he cited *Sir John Eyles v. Ward.*(a)

The register, Mr. Walker, on being referred to by the Vice-Chancellor, confirmed Mr. Pemberton's statement of the practice, and his honor refused the motion with costs.

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PENNINGTON v. ALVIN.

1823, 17th and 31st January, and 31st May.—*Prochein ami.*

Where the next friend of a *feme covert* had taken the benefit of the insolvent debtors' act, but was detained in prison, and had obtained an order upon the husband for payment of his groats after the answer was filed, and before any other proceeding was taken in the cause, a motion by one of the defendants, that the next friend might be removed and another appointed, was refused, as being improper in form ; but leave was given to apply to stay proceedings until the next friend should be changed, or security given for costs.

1823.—Pennington v. Alvin.

THE bill was filed by a *feme covert* and her infant child, by Joseph Lowe as their next friend, against her husband, and her brother, the defendant Alvin.

The husband had brought an action against Lowe for criminal conversation with his wife, and having obtained a verdict had taken him in execution. When in execution he took the benefit of the insolvent debtors' act, but was detained in prison for a year, and therefore, had applied for his groats from the husband, and obtained an order for payment of them. The verdict was obtained before the bill was filed; but the taking of the benefit of the insolvent debtor's act, and the order for payment of the groats, were subsequent to the filing of the defendant's answer, and no step had been taken in the cause since. The object of the suit was to obtain maintenance and support out of a fund to which the wife claimed to be entitled for her separate use, and in which the infant also was interested.

[\*265] \*Mr Roupell, on behalf of the defendant Alvin, now moved that Lowe might be removed from being the next friend of the wife, and that a new next friend might be substituted in his place. He said that, as the *prochein ami* was liable to pay the costs of the suit, it was necessary that he should be a person of substance; and that, as Lowe was insolvent it was a sufficient ground for removing him from that office. *Wale v. Saller.*(a)

Mr. Koe, contra:—In this case the same person is *prochein ami* for the infant as well as for the wife. This application comes too late. It is very hard, after the suit has proceeded the length it has done, to impose upon the parties the necessity of naming a next new friend. *Anon.*;(b) *Squirrel v. Squirrel*;(c) *Anon.*;(d) *Doe v. Alston*;(e) *Sayer on Costs*, 84.

The Vice-Chancellor suggested that the proper motion would have been, that all proceedings in the suit might be stayed until security were given for costs; and he directed that the motion should stand over, in order that he might consider what order ought be made upon it.

The VICE-CHANCELLOR:—I should hesitate much before I called upon the next friend of an infant to give security for costs; for any person may file a bill in the name of an infant. But the suit of a *feme covert* is substantially her own suit, and her next friend is selected by her.[1] This is a gross \*case, and I cannot permit this suit to proceed, on the part of the *feme covert*, without security being given for costs. I must, however, refuse this motion, because it is incorrect in form; but the defendant

(a) Mosley, 86.

(b) 1 Ves. jun. 409.

(c) 2 P. W. 297, n; and S. C. 2 Dick. 765. This case seems to be the same as the former one.

(d) Mos. 86.

(e) 1 T. R. 491.

[1] On bill by wife against husband for a divorce *a mensa et thoro*, if the next friend of the wife is irresponsible or insolvent, all proceedings may be stayed until security for costs is given, or a responsible person is substituted in his place. *Lawrence v. Lawrence*, 3 Paige, 267. And if such security is not given, or a new *prochein ami* be substituted within a reasonable time, the bill may be dismissed. *Camac v. Grant*, 1 Sim. 348. *Fulton v. Roswell*, 1 Paige, 178. *Massay v. Gillelan*, Id. 544. *Robertson v. Robertson*, 3 Paige, 387.

1823.—Wright v. Mudie.

may apply to stay all proceedings in the cause until the next term is changed, or security is given for costs.[1]

WRIGHT v. MUDIE.

1823, 27th February; 8th March.—*Set-off of costs.*

The court will not direct the costs of a suit and of an action between the same parties to be set off against each other.

THE defendant had brought an action in the court of king's bench against the plaintiff, and was non-suited. The bill in this cause was filed for a discovery, in aid of the defence to that action. The defendant had put in his answer, and moved for his costs.

Mr. Barber, for the plaintiff, now moved that the defendant might be restrained, by injunction, from suing out a subpœna for his costs in this suit, on the ground that the defendant having been nonsuited in the action, the plaintiff was entitled to set off his costs in that action, against the defendant's costs in this suit. Where the same party has to receive, as well as to pay costs, courts of law will prevent the adverse party from proceeding for any thing but the balance. Upon this subject, courts of law act upon equitable principles; and it would be hard, if a party was not to have the benefit of those principles in this court. *Hullock on Costs*, 467; *Hall v. Ody*; (a) *Shergold Brewster*; (b) *Gurish v. Donovan*; (c) *Shine v. Gough*; (d) *Taylor v. Popham*; (e) *Ex parte Rhodes*. (e)

\*Mr. Spence, contra:—The practice of the court of king's bench [\*267] upon the subject in question, has not been correctly stated by Mr. Barber. It is laid down by Lord Kenyon, in *Randle v. Fuller*, (f) and that decision was followed in *Glaister v. Hewer*, (g) and *Middleton v. Hill*. (h) I have not been able to find any case which sets up a different practice from that stated by Lord Kenyon; therefore, it appears to be the settled practice of the court of king's bench, that no set-off can be made to the prejudice of the solicitor's lien. The case of *Taylor v. Popham* is not applicable; for it relates to costs in this court only. That case shows strongly, that the practice of the court of king's bench remains the same as it was stated to be by Lord Kenyon; for the Lord Chancellor, in his judgment, states it to be so.

THE VICE-CHANCELLOR:—It is clear upon the authorities, that the practice of the common pleas, as stated in the case of *Hall v. Ody*, that the lien of the attorney for his costs is subject to the equitable claims of the parties as between

(a) 2 Bos. & Pull. 28.  
(d) 2 Ball & Beatty, 33.  
(g) 8 T. R. 69.

(b) Bunb. 29.  
(e) 15 Ves. 72, 539.  
(h) 1 M. & S. 240.

(c) 2 Atk. 166.  
(f) 2 T. R. 456

[1] Ante, *Davenport v. Davenport*, 101. *Saunders & Scully*, 668, note.

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 1818.—Bishop of London's case.
 

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themselves, is not adopted in the court of king's bench ;[1] and Lord Eldon, then Chief Justice of the common pleas, expressly states it to be contrary to the practice of the court of chancery. In *Taylor v. Popham*, Lord Eldon states the rule of this court thus: That where in a cause costs may have been given in different proceedings on both sides, there the lien of the solicitor is only on the balance of costs which may be due to his client. That case is not an authority for setting off, against each other, the costs of different causes in this court; and still less for setting off costs here against costs in the king's bench, when it is clear that that court would not permit the set-off of costs there against the costs here.[2]

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#### THE BISHOP OF LONDON'S CASE.(a)

1818, 6th August.

Where, by act of parliament a corporation was empowered to purchase subsisting interests in certain hereditaments, and it was directed that the purchase money should be re-invested in land, and in the mean time be laid out in the funds, and the dividends paid to the persons entitled to the rents: held that neither persons who had taken leases after the passing of the act, nor the lessors in respect of their right to renew, were entitled to any compensation out of the purchase money.

By the 55 Geo. III. c. 91, the lord mayor, alderman and commons of the city of London were empowered to make a site for a new post-office, by taking down and laying open the buildings, lands and hereditaments described in the schedule to the act, and to agree for the purchase of such houses and other hereditaments, and of any subsisting leases, estates and interests therein, as they should think proper; and corporations aggregate and sole, and all other persons who were or should be seised or possessed of, or interested in, any hereditaments described in the schedule, which the lord mayor, aldermen and commons should think proper to purchase, were authorized to sell and convey the same; and all bodies corporate, and other owners of houses, lands and hereditaments, were empowered to accept such satisfaction for the value thereof, as should be agreed upon between them and the lord mayor, aldermen and commons; and, in case they could not agree as to the amount of such satisfaction, the same was to be ascertained by a jury; and it was directed, that the money to be paid for any hereditaments to be purchased under the act, belonging to any body politic or corporate, should be paid into the bank of England, in the name of the accountant-general of this court, to the intent that [\*269] \*it might be laid out, under the direction of the court, in the purchase of other lands and hereditaments, to be conveyed to the same uses as the hereditaments so purchased were subject to; and that, until such purchase,

[a] Ex relatione.

[1] This contrariety of practice is noticed by Walworth, Ch. 1 Paige, 625.

[2] As to set-off of costs, vide *Dunkin v. Vandenberg*, 2 Paige 622. *Williams v. Edwards*, 2 Sim. 78.

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 1818.—Bishop of London's case.
 

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the money should, by order of the court, be invested by the accountant-general, in his name, in the purchase of stock; and that, until the stock should be ordered by the court to be sold for the purpose of being so laid out, the dividends should be paid to the bodies or persons who would for the time being, have been entitled to the rents and profits of the hereditaments directed to be purchased, in case such purchase had been made.

When this act was passed, the bishop of London, in right of his see, was seised of nine houses in Newgate-street and Cheapside, which were then let, at certain small rents, on leases for lives or years, and were part of the hereditaments described in the schedule to the act; and, subject to the leases, were of the value of 9,895*l.* 0*s.* 7*d.* The bishop, after the passing of the act, granted a concurrent lease of one of these houses, for a fine, to one Burn; and, of the others, to one Blount, as a trustee for Burn. The bishop claimed before the jury, who had been summoned to assess the value of the property, a certain part of the 9,895*l.* 0*s.* 7*d.* as being due to him personally in respect of his general right of renewal of the possessions of the see. And Blount and Burn claimed other sums as being due to them for the value of their concurrent leases. The recorder of London, who presided at the trial, directed the jury not to take into their consideration either the personal claim of the bishop, or the value of the concurrent leases; because those leases had been granted after the passing of the act. And the verdict of the \*jury in fact established, that the whole sum was the property of the see. [\*270]

The 9,895*l.* 0*s.* 7*d.* having been afterwards paid into the bank in the name of the accountant-general, pursuant to the act, the bishop of London, and Blount, presented a petition to the court, asserting the same claims as had failed before the jury. This petition now came on to be heard.

**THE VICE-CHANCELLOR :—**All the costs of the proceedings, both here and in the lord mayor's court, must be paid out of the 9,895*l.* 0*s.* 7*d.* the surplus must be invested in the purchase of 3*l.* per cent bank annuities; and I must direct a reference to the master, to inquire what were the annual rents of the houses at the time of the sale. When this money is invested in the purchase of land, the bishop will be entitled to grant one or more lease or leases for twenty-one years, or three lives, at his option, of the hereditaments to be purchased, reserving an annual rent or rents equal in amount to the annual rents of the houses at the time of the sale, and to renew such leases from time to time, at the same rents, in like manner as is usual in cases of leases by bishops; and if the bishop should cease to be bishop of London, in consequence of his decease or otherwise, before he has granted such lease or leases, then he or his personal representative may apply to the court, as they shall see fit. And until the money is invested in land, the dividends of the stock must be paid to the bishop and his successors.

1823—Griffith v. Heaton.

[\*271]

GRIFFITH V. HEATON.

1823, 14th March and 1st May.—*Vendor and Vendee.—Account.—Rests.—Practice.*

Where payments have been made by a vendee at different times on account of his purchase, all exceeding the interest due at the times of such payments, and the decree in a suit by the vendor for a specific performance, directs an account to be taken of what is due to the plaintiff for the principal and interest in respect of the purchase, rests are always made in taking the account.

THE bill was filed by the vendors of an estate against the purchaser, for a specific performance of the agreement for the purchase. Several sums of money had at different times been paid by the defendant on account of his purchase, and the master, in taking the accounts of those sums, had made rests at the times when they were paid. The question was, whether the master was justified in taking the accounts in that manner.

The agreement was dated the 1st of June 1807. The purchase-money was 56,000*l.*; 2,800*l.*, part of it, was paid, as a deposit, on the signing of the agreement; and the remainder was to be paid by two instalments, on the 1st of January and the 2d of August 1808, with interest at five per cent; and on the latter of those days the conveyance was to be executed. By the decree made on the hearing of the cause, it was referred to the master to take an account of what was due to the plaintiff for principal and interest, in respect of the purchase money. The master, by his report, found that various sums of money had been paid by the defendant from time to time on account of the purchase money and the interest thereof, amounting in the whole to the sum of 47,795*l.* 12*s.* 8*d.*; and he certified, that it appeared to him to be fair and reasonable that

the account of principal and interest remaining due in respect of the  
[\*272] purchase, should be taken with periodical rests at the \*respective times when such payments were made; and that he had accordingly taken the account with such rests. To this report the defendant excepted, because the master had stated the account of principal and interest remaining due to the plaintiffs, with rests at the respective times when the several sums mentioned to have been paid by the defendant, on account of the purchase money and interest, were respectively paid; whereas he ought not to have made any rests, he not having been directed by the decree so to do; and the several sums paid by the defendant ought to have been allowed to him as payments out of his purchase money.

Mr. *Horne* and Mr. *Roupell*, in support of the exception, said, that the master had taken the accounts in this case, upon the principle adopted in taking accounts between mortgagor and mortgagee; but that mode was never followed in suits between vendor and vendee.

Mr. *Bell* and Mr. *Parker*, for the report, said, that when payments were made to a creditor, he had a right to apply them, either to the account of principal or of interest, at his pleasure; and that the masters, in taking accounts, acted upon that principle.

The Vice-Chancellor said, that he must learn the practice of the masters

1823.—*Lupton v. Hescott.*

upon the subject ; and, accordingly, directed the following question to be submitted to them :—

“ By a decree made upon a bill for a specific performance, it was ordered, that it be referred to the master to take an account of what was due to the plaintiffs, from the defendant, for principal and interest, in respect \*of the purchase-money for the estate and premises comprised in the [\*273] agreement in the pleadings mentioned ; such interest to be computed at five per cent per annum. The account extends to a period of ten years ; and, in the course of that time, the defendant had made sixteen payments on account, all exceeding the interest due at the time of such payments. Is it the practice of the masters’ offices, under such circumstances, to take the accounts directed by the decree with rests, at the sixteen periods when the sixteen payments were made, making at each rest, a new principal sum to carry interest, formed from the balance then due, on account of principal and interest ? ”

In reply to this question, a certificate was returned to the Vice-Chancellor, signed by nine of the masters, by which they stated, that they had considered the question proposed to them, and that, under the circumstances above mentioned, it was the practice of the masters’ offices to take accounts in the manner referred to by his honor.

The Vice-Chancellor said, that he concurred in this certificate, and must, therefore, overrule the exception. [1]

## \*LUPTON v. HESCOTT.

[\*274]

1823, 28th February, and 17th April.—*Practice.—Sequestration.*

The court will order a sequestration to issue against a defendant who is in contempt, for not putting in an examination to interrogatories before the master.

THE defendant having refused to put in his examination to interrogatories which had been exhibited before the master under the decree, had been taken into custody by the sergeant at arms, and committed to the Fleet.

Mr. *Wray* now moved, that a sequestration *nisi* might issue against him, until he should put in his examination.

The decree, in this case, is not for payment of money, but to put in an examination to interrogatories, and the question is, whether a sequestration can be awarded in such a case ? In *Maynard v. Pomfret*,<sup>(a)</sup> Lord Hardwicke, after a decree, refused to discharge a sequestration which had issued against

(a) 3 Atk. 468.

[1] Acc. *The State of Connecticut v. Jackson*, 1 Johns. Ch. Rep. 17 ; 3 Cow. 87, note *Bingston v. Harwood*, 1 Turn. & Russ. 477. *Story v. Livingston*, 13 Peters, 359. But on taking an account between parties who had been partners, the mercantile mode of computing interest was allowed, such having been the practice of the parties themselves. *Stoughton v. Lynch*, 1 Johns. Ch. Rep. 209.



1823.—*Warter v. Hutchinson.*

the defendant for want of an answer, and kept it on foot as a security for the defendant performing the decree. *Shaw v. Wright.*(b)

The Vice-Chancellor said, that he would not decide upon the motion, until he had consulted the register.(c)

[\*275] \*The VICE-CHANCELLOR:—I am of opinion that the plaintiff is entitled to a sequestration in this case; whether the produce of it is applicable to the purposes of the cause, it is not necessary now to inquire. I shall order the sequestration to continue until the defendant clears his contempt, and until the further order of the court.

[\*276]

\*WARTER v. HUTCHINSON.

1823, 13th March.—*Will.—Construction.*

Where real estates were devised in strict settlement, subject to a trust for raising portions for younger children during the minority of the tenant for life, out of the rents and profits, or by sale or mortgage; held, that certain funds which had arisen from the rents during the minority of the tenant for life, were applicable to the payment of the portions, and that the deficiency only could be raised by sale or mortgage.

THOMAS MEREDITH, deceased, by his will, duly executed to pass freehold estates, directed all his debts and funeral expenses to be paid by his trustees and executors, and for that purpose he charged all his messuages, lands, tenements, and hereditaments, in the counties of Denbigh and Chester, with the payment of the same, in aid of his personal estate; and, subject thereto, he devised all his messuages, lands, tenements, and hereditaments, unto Brownlow

(b) 3 Ves. 22.

(c) The Vice-Chancellor was furnished by Mr. Walker, the register, with the two following cases:—

TRIGA v. TRIGA.

*Practice.—Sequestration.*—Sequestration ordered against a party in custody, for contempt in not producing papers.

April 1759.—This usual decree was made in this cause for a partition, and for the production of deeds, &c. before the commissioners. An attachment had issued against the defendant for not producing the deeds in his possession, and he being brought to the bar of the court was turned over to the Fleet. The plaintiff moved, specially, that a sequestration might issue against the defendant. The defendant appeared by counsel and opposed the motion; but the court ordered the sequestration in the first instance. *Reg. Lib. B. 1758, E. T.* This case is reported, 1 Dick. 325.

DETILLIN v. GALE.

By an order dated 10th May 1799, it was referred to the master to tax the defendant Sydney's bill of costs, and Sydney was ordered to produce before the master, on oath, all deeds, &c. in his custody belonging to the plaintiff or his estate. Sydney was served with this order in the Fleet prison. The master having certified that Sydney had not produced the books to him, it was ordered that Sydney should produce them before the 1st day of next term, or be confined a close prisoner in the Fleet prison. Sydney having been served with the order, and the master having certified that he had not produced the books, &c. a sequestration *nisi* was ordered against him on the 24th May, and on the 17th July 1799 it was made absolute. *Reg. Lib. 1798, T. T.*

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1823.—Warter v. Hutchinson.

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York, Richard Lloyd, and John Hutchinson, their heirs and assigns, in trust to permit his sister Margaretta Warter, the wife of Joseph Warter, and her assigns, during her life, to take thereout an annuity of 200*l.*; and his aunt Mary Newton, and her assigns, during her life, an annuity of 100*l.* And, subject to those annuities, he gave the same messuages, lands, tenements, and hereditaments, to the same trustees, their heirs and assigns, until his nephew J. R. M. Warter, the son of his sister Margaretta Warter, should attain the age of twenty-one years; and if he should die in the mean time, then until Henry Warter, the second son of his sister Margaretta Warter, should arrive at that age; and if Henry Warter should die in the mean time, until the daughter of Margaretta Warter should arrive at that age; upon trust, in the first place, as soon as conveniently might be after his decease, to raise out of the rents and profits of the premises, or by sale or mortgage thereof, or of a competent part thereof, any sum or sums of money that would be sufficient to pay his debts and funeral expenses, and the costs and expenses his trustees should be put unto \*on account of the trusts of his will, and [\*277] the sum of 100*l.* a-piece, which he thereby gave to them, with a direction to them to retain the same out of the rents and profits of the premises, for their trouble: And upon further trust, to raise out of the rents and profits of the premises, or by sale or mortgage thereof, or of a competent part thereof, the sum of 2,000*l.* together with all costs and charges attending the raising the same, and to pay the same to Henry Warter as soon as he attained the age of twenty-one years; and if Margaretta Warter should have more than one younger child, then he directed his trustees to raise, out of the rents and profits of the premises, the sum of 3,000*l.* and pay the same to and among such younger children, share and share alike, as soon as they should attain their respective ages of twenty-one years; and he charged all the said hereditaments with the payment of the same: And upon further trust, to apply a proper sum of the money, arising, from the rents and profits of the said premises, for the maintenance and education of J. R. M. Warter till he should arrive at the age of twenty-one years; and when he should arrive at that age, then, upon further trust, to pay him the rest of the rents and profits of the premises, if any should remain in their hands after payment of all his debts and funeral expenses, and the sum of 2,000*l.* and 3,000*l.*, as the case should happen; and if J. R. M. Warter should die before he attained the age of twenty-one years, then he directed his trustees to apply a sufficient sum of money, arising from the rents and profits of the premises, for the maintenance and education of Henry Warter till he should attain the age of twenty-one years; and when Henry Warter should attain that age, then upon trust to pay him the rest of the rents and profits, if any should remain in their hands after \*payment of his debts and the money intended for his sister's young- [\*278] er children as aforesaid; and, in the mean time, to place out the money arising from the rents and profits of the premises at interest for their benefit; and when J. R. M. Warter should attain the age of twenty-one years,

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or, in case of his death, when Henry Warter should arrive at that age, or, in case of his death, when his niece Margaretta Mary Elizabeth Warter should arrive at that age, he gave his messuages, lands, tenements, and hereditaments, situate in the counties of Denbigh and Chester, or elsewhere in Great Britain, subject as aforesaid, to the trustees, their heirs and assigns, to the use of J. R. M. Warter and his assigns, for his life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to the use of the first and other sons of the body of the said J. R. M. Warter, successively in tail male, with remainder to his first and other daughters, successively in tail male, with remainders to Henry Warter for life, and to his sons and daughters in tail male, in like manner; with remainders to Margaretta Mary Elizabeth Warter for life, and to her sons and daughters in tail male, in like manner; with remainder to the testator's sister Margaretta Warter, her heirs and assigns, for ever. And as to all his household furniture, and all his silver plate whatsoever, that should happen to be at his mansion house, at Pentrelychan Hall, at the time of his death, he directed that the same, or any part thereof, should not be sold or removed from thence, but should go and continue as heir-looms, for the use of the heirs of Pentrelychan Hall for ever.

[\*279] The testator died in 1802. Shortly after his decease \*this suit was instituted, for the purpose of carrying into execution the trusts of his will.

After the cause had been heard for further directions, J. R. M. Warter died, an infant and intestate, leaving Jane Warter, his widow, and Margaretta Elizabeth Meredith Warter, his only child, his heir at law.

Jane Warter, the widow of J. R. M. Warter, took out letters of administration to her deceased husband, and a bill of revivor and supplement was afterwards filed against her and her daughter M. E. M. Warter.

The master by his report (which was made in J. R. M. Warter's lifetime) had found that Margaretta Warter, the testator's sister, had four younger children; Henry, Margaretta Mary Elizabeth, Joseph, and Thomas. Henry attained the age of twenty-one years on the 16th of November 1821, and Margaretta Mary Elizabeth on the 7th of August 1822.

By an order made upon the petition of Margaretta Mary Elizabeth Warter, on the 5th of November 1822, it was referred to the master to compute interest on the sum of 3,000*l.* directed to be raised for the younger children of Margaretta Warter, from the 16th of November 1821; and that sum was ordered to be raised out of two sums of cash and stock, which had arisen from the rents of the devised estates, and one-fourth part of it paid to the petitioner, without prejudice to any claim she might have upon the remaining three-fourth parts.

In December 1822, Margaretta Elizabeth Meredith Warter died; [\*280] and her mother afterwards took out \*letters of administration to her, and, as the personal representative of her husband and daughter, claim-

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ed the whole of the funds which had arisen from the savings of the rents and profits.

In pursuance of this claim, Mr. *Hart* and Mr. *Temple* now moved to rescind the order of the 5th of November 1822.

It is the rule of the court, in all cases where a testator directs portions to be raised out of real estates, to look through the will, to see whether the testator meant the body of the estate to be charged, or the rents and profits only. The first case upon this point is a very strong one; it is *Sir William Middleton's case.*(a)

The testator having directed the 3,000*l.* to be paid at a fixed day, namely, when Henry Warter should attain twenty-one, he must have meant that it should be raised out of the body of the estates, and not out of the rents and profits; for, otherwise, the portions might have become payable before the rents were sufficient to pay them. There is also another very strong case upon this subject, *Warburton v. Warburton.*(b)

I apprehend that every principle on which that case was decided applies here; for if it is held that the rents and profits are applicable, the person who has the contingent interest in the property has the usufruct taken from him whilst the portions are being raised. Then, as to the direction that the trustees should pay the rest and residue of the rents and profits to J. R. M. Warter, these words do not mean annual rents, but the surplus \*of [\*281] the moneys remaining in the hands of the trustees after paying the portions; for, in almost every case, the court has construed the words "rents and profits" to mean the produce of the *corpus* of the estate.

Mr. *Sugden* and Mr. *Parker*, contra.

The VICE-CHANCELLOR:—This, like every other case upon a will, is a question of intention to be collected from the whole will. This testator has expressly stated that his first devisee, who attains twenty-one, is to take such accumulated rents and profits only as shall remain after satisfying the portions, and, of consequence, must have intended that the accumulated rents and profits should be first applied in payment of the portions. To the extent in which the accumulated rents and profits would not have satisfied the portions, the trustees would have been entitled to proceed by sale or mortgage.

Motion refused.(c)

(a) 2 Chan. Ca. 1.

(b) 2 Vern. 420.

(c) In the course of this cause a case was made for the opinion of the court of common pleas. For the report of that case, see 5 Moore, 143. And another case was afterwards made for the opinion of the court of king's bench, and is reported 1 Barn. & Cress. 721.[1]

[1] The real estate is not, as of course, charged with the payment of legacies. It is never charged unless the testator intended that it should be, and that intention must be either expressly declared or fairly and satisfactorily inferred, from the language and dispositions of the will. There must be indicated a pretty strong intention that the legacies are at all events to be paid; as, in a devise of real estate, *after payment of debts and legacies*, or a direction that *debts and legacies be first paid*. *Lupton v. Lupton*, 2 Johns. Ch. Rep. 623. The words "rents and profits" in a devise, may be so construed as to authorize a sale of the land, when necessary to raise a sum, so as to effect

1822.—*Moir v. Mudie.*

[\*282]

## \*MOIR V. MUDIE

1823, 18th March, and 31st May.—*Solicitor.*

A solicitor who had refused to act any longer for a party in the cause, was ordered to permit the party to inspect papers in his possession, at all reasonable times, without any undertaking, on her part to proceed to a taxation of his bill.

THE solicitor of one of the defendants having refused to act any longer for her, Mr. *Rossell* moved, on her behalf, that the solicitor might be ordered to deliver up to her all papers in her possession relating to the cause. He cited *Cresswell v. Byron*,<sup>(a)</sup> and *Commerell v. Poynton*,<sup>(b)</sup> and said that in this case, as in *Cresswell v. Byron*, the party making the application swore that there was no fund for payment of the costs, except the fund in the cause.

The Vice-Chancellor doubted whether he could make the order, without imposing on the defendant the condition of proceeding to an immediate taxation of the solicitor's bill, with the usual undertaking to pay the amount of it when taxed; and he therefore directed the motion to stand over for the purpose of considering the subject.

The Vice-Chancellor ordered that the solicitor should permit the defendant to inspect her papers in his possession, at all reasonable times; and said, that as the solicitor had thought fit to retire from the suit, he had no right to retard its progress; and that, therefore, the permission given to the client for inspection of the papers was not an indulgence but a right, and gave no claim to the solicitor for any special assistance from the court; but that he must be left to his ordinary remedy against his client.[1]

[\*283]

## \*HARRIS V. BODENHAM and others.

1823, 18th March.—*Practice.*—*Clerk in court.*

The court never orders a clerk in court, with whom exhibits have been deposited under the usual order, to deliver them up to any other person, for the purpose of their being produced in court, or at the assizes, without the consent of all parties, and payment of the clerk in court's fees.

CERTAIN letters and other documents had been deposited by the defendants Garrett, Shaw, and Hornyhold, with their respective clerks in court, under the usual order, which had been obtained by the plaintiffs for that purpose.

Mr. *Pemberton*, for the plaintiff, had moved on a former day that these let-

(a) 14 Ves. 271.

(b) 1 Swanst. 1.

the object of the testator. *Schermerhorn v. Schermerhorn*, 6 Johns Rep. 70. The testator directed his trustees to sell his real and personal estate and apply the proceeds in paying his debts, and the legacies therein after given, the testator afterwards gave legacies by codicils, but without charging them on the real estate; it was held that only the legacies in the will were payable out of the real estate. *Strong v. Ingraham*, 6 Sim. 197.

[1] Vide *Brassington v. Brassington*, post, 455, 457, and note, *ibid.*

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 1823.—*Harris v. Bodenham and others.*


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ters and documents might be delivered over to the plaintiff's clerk in court, and be by him produced, at the joint expense of the plaintiff and the defendant Garrett, and given in evidence for either party at the ensuing assizes for the county of Hereford, in the action there depending between them.

Mr. *Roupell*, for the defendant Hornyhold and his clerk in court, opposed the motion, and said that the clerks in court were responsible for the safe custody of all the documents deposited with them, and were entitled to all fees accruing from the inspecting or copying of them, and also to attend with them in court or elsewhere, as might be required; and that no instance had ever occurred, where the court had taken the documents belonging to one party, and placed them in the hands of his adversary, or of his adversary's clerk in court.

The Vice-Chancellor ordered the motion to stand over, that he might inquire into the practice. And on this day he said, that he had received a certificate from the clerks in court, which was as follows:—

“ We do certify, that in all cases where exhibits are left under an [\*284] order in the hands of the clerk in court for a plaintiff or defendant, and it has become necessary to have those exhibits produced in court, or at the assizes, it is and ever has been the invariable practice, that the clerk in court in whose custody they are so deposited, or some person authorized by and acting for him, and no other person, should attend therewith, upon payment of his fees and expenses. And we know of no instance where exhibits have been ordered to be delivered up for the aforesaid purpose to any other person, unless by the consent of all parties, and upon payment of the clerk in court's fees.”

His honor observed, that this certificate was a very strong one, and that he must hold the practice to be as stated in it.

Motion refused.

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#### CANN v. CANN.

1823, 22d March, and 31st May.—*Vendor and purchaser.—Title.*

Where a devise of real estate subject to debts and legacies, had contracted to sell the estate, in order to raise money to pay the debts, and afterwards a bill was filed against her by the legatees for the administration of the testator's estates, and the purchaser consented to go before the master, upon a reference as to the title in that suit; held, that he was not thereby bound to take an equitable title, but might insist on having the same title, as he might have required if a suit had been instituted against him for a specific performance of his contract; and that as two commissions of bankrupt had issued against the devisee before the contract was entered into, though neither of them was proceeded in, he was not bound to accept the title.

*JOHN CANN*, Esquire, deceased, by his will, duly executed to pass freehold estates, gave legacies to his children, and devised and bequeathed the residue of his real and personal estates, after payment of his debts, legacies, and funeral expenses, to his wife *Rebecca Cann*, absolutely, and appointed her executrix of his will.

1893.—*Cann v. Cann*.

[\*285] \*Mr. Cann, at the time of his death, carried on the business of a banker, in partnership with Messrs. Williams and Searle; and Mrs. Cann, after her husband's death, continued the business in partnership with the same gentlemen. On the 23d of December 1820, a joint commission of bankrupt was issued against her and her partners, and on the 14th of January 1822, a separate commission was issued against her, but neither of the commissions was opened. In July 1821 Mrs. Cann, in order to raise money to pay her late husband's debts, agreed to sell part of the real estates to one Arscott. In the December following, a bill was filed against her by her children, for the administration of the testator's real and personal estates.

By the decree made on the hearing of the cause, on the 28th of January 1822, it was (amongst other things) referred to the master, to inquire whether Mrs. Cann had entered into any contracts for the sale of any parts of the testator's real estates, and if the master should find that she had, whether it would be for the benefit of the parties interested that those contracts should be carried into effect. The master, by his report, stated that Mrs. Cann had entered into the agreement before mentioned, and also several other contracts for the sale of different parts of the testator's real estates, and that he was of opinion that it would be for the benefit of the parties interested, that all the contracts should be carried into effect.

By an order made on a petition presented by the plaintiffs, the master's report, so far as it related to the contracts with Arscott and another of [\*286] the purchasers, was confirmed; and it was ordered that Arscott, \*objecting to the title to the estate which he had purchased, but consenting to go before the master upon such title, it should be referred to the master to see if a good title could be made thereto. On the third of this month the master reported in favor of the title. Upon which the plaintiffs presented a petition, praying that Arscott might be ordered to pay his purchase money into court, and that the defendant and all other necessary parties might be ordered to execute to him a proper conveyance of the estate which he had purchased. At the same time Arscott presented a cross petition, praying that the master's report, so far as it found that a good title could be made to the estate, might not be confirmed, and that he might be at liberty to except thereto.

Both these petitions now came on to be heard.

Mr. *Sudgen* and Mr. *Knight*, for Mr. Arscott:—The defence made in favor of the title is, that neither of the commissions has been opened. But the question is, whether, as this is not a purchase under the decree of the court, and as neither of these commissions has been superseded, the existence of them is not such a cloud upon the title, that the court will not compel the purchaser to take it? *Lowes v. Lush*; (a) *Franklyn v. Lord Brownlow*. (b) Sir S. Romilly's act (c) makes the issuing of a commission notice of a previous act of bankruptcy. *Watkins v. Maund*. (d) If either of these commissions is proceeded

(a) 14 Ves. jun. 547.

(c) 46 G. 3. c. 135.

(b) Ibid. 550. See also *Powell v. Powell*, 6 Madd. 53. \*

(d) 3 Camp. N. P. Rep. 308.

1823.—*Cann v. Cann.*

with, the bargain and sale of the commissioners will, beyond all doubt, pass the legal estate to the assignees; and the purchaser will be compelled to file a bill against the assignees, to \*get the legal estate re-conveyed [\*267] to him. Now this court never forces a purchaser to buy a suit in equity.

*Mr. Bell and Mr. Spence, for the plaintiffs:*—The cases alluded to have not the least reference to the present question. These commissions, though not superseded, are supersedeable; and the court will never let the parties act upon them. Suppose the court had directed a sale of this estate, could it have been contended by the assignees that, because *Mrs. Cann* had committed an act of bankruptcy before the decree was pronounced, the title to the purchaser failed? This estate being devised charged with debts, the devisee is a trustee; and therefore the estate would not, even at law, pass to the assignees; for courts of law, in such cases as the present, look at trusts, and a trust estate is not considered as passing at law. *Allanson v. Forster.*(e) *Lowes v. Lush*, was a case where a party, who had committed an act of bankruptcy, had entered into a contract for the sale of the estate. There was no trust there; and the single question was, whether this court would compel a purchaser to take a title so situated, there being a clear admitted act of bankruptcy? It appears to me that this case stands thus: Here is a person to whom property is given charged with debts; a court of equity declares this person a trustee, and directs a sale, and that sale is given effect to in a court of equity. Can it be contended that, if a commission of bankrupt has issued against the trustee, that is a good ground for a purchaser to resist the completion of his purchase? What this party has done, has been done under the decree of a court of equity; and the real question is, whether, inasmuch as this is done \*under the direction of a court declaring a trust, that must not [\*288] be considered to be binding on all parties? In suits like this, if a contract has been entered into before the bill was filed, the court never cuts down the contract, but refers it to the master to inquire whether it is a fair and proper contract, and if the master reports it to be a fair and proper contract, the court then directs it to be carried into effect. *Cary v. Crisp;*(f) *Lempriere v. Pasley.*(g)

The suit amounted to a declaration of trust, and it results to this question; whether the court will, or will not, proceed to sell a trust estate under these circumstances? The decree has left no interest in this estate in the vendor, she has no interest except in the surplus of the purchase-money after the debts and legacies are paid. This is the same case as if the estate had been sold under the decree of the court. For here the court, finding this to be a proper agreement to be carried into execution, adopts it as if it had been its own sale.

*Mr. Sugden*, in reply, cited the case of *Hartely v. Smith.*(h) Where the court takes upon itself to decree a sale, the court will compel a purchaser to take an equitable title. But if the purchaser sells again, the court will not

(e) 2 T. R. 479.

(f) 1 Sal. 108.

(g) 2 T. R. 485.

(h) 1 Buck, 368.



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 1823.—*Jones v. Mitchell and others.*


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compel the purchaser from him to take the title. *Lord Wallham's case.* (i) Supposing this to be a case where, if the estate had been sold under a decree, the court would have compelled the purchaser to take the title, can the court compel him to take it, when he merely consents to a reference to inquire whether a good title can be made? This purchaser would be taken by surprise, if, when he consented to this reference, merely to save the expense of a bill being filed against him for a specific performance of his contract, and did not submit himself to any authority of the court to make him take an equitable instead of a legal title, the court should compel him to take this title. Mr. Arscott says he understood, when he came in under this decree, that he was to be in the same situation as if a bill had been filed against him. If this lady had filed a bill against the purchaser, making all the persons interested in the distribution of the purchase money parties to the suit, it would have been impossible for the court to compel him to complete this contract, unless the parties could have assured to him the legal estate.

The VICE-CHANCELLOR :—When this purchaser became a party to the reference to the master upon the title, it is not to be intended that he meant more than to place himself in the same situation upon the master's report, as he would have been in if the reference had been made in a suit instituted for the specific performance of the agreement; and in such a suit he would not have been bound to accept this title. It is stated, that what is thus generally to be intended was, in truth, the express understanding of the party in this case; and I must therefore dismiss the original petition, and make an order according to the prayer of the cross-petition.[1]

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[\*290]

\*JONES v. MITCHELL and others

1823, 26th February.—Will.—Conversion.—Costs.

N. H. by will, gave 800*l.* out of the money to be produced by the sale of her real estates, to trustees, for the benefit of certain charitable institutions, and she gave the residue of the money to J. R. The gift of the 800*l.* being void, her heir is entitled to it, and not J. R.

The costs of the suit were ordered to be borne, proportionably, by the legacy of 800*l.* and the residue of the produce of the real estate.

NANCY HOLT, by her will, duly executed to pass freehold estates, devised all her real and personal estates to the defendants, Mitchell and Bradley, and to J. Garlick, deceased, (whom she also appointed her executors,) their heirs, executors and administrators; upon trust, to pay the rents and profits of her real estates to her brother, Thomas Holt, for his life; and after his decease, upon trust to pay the same rents and profits unto and amongst all his children, their heirs and assigns; but in case her brother should die without lawful issue

(i) Sug. Vend. 4th ed. 572

[1] Vide *Wright v. Howard*, ante, 205, note.

1823.—*Jones v. Mitchell and others.*

of his body, or, leaving such, all such issue should die under the age of twenty-one years, then she directed her trustees to pay the rents of her half part of her estate, called the Box Trees, to Sarah Ratcliffe, for her life; and after her decease, she devised that half part to S. Ratcliffe's eldest son, his heirs and assigns; and as to all the residue and remainder of her real estate, after her brother's decease without lawful issue, or leaving such, after his, her or their decease under the age of twenty-one years, she directed her trustees to sell the same, and out of the moneys to be produced by the sale, to pay certain legacies; and then to lay out the sum of 800*l.* in the purchase of landed property, and to convey and settle the property, so to be purchased, in such manner as that the rents and profits thereof might be applied in manner following, for ever: (that is to say:) one-fourth part to the trustees, directors, or treasurer of the Halifax Dispensary, for the better support thereof, and the remaining three-fourth parts to be divided \*amongst the directors, [\*291] trustees or treasurers for the time being, for ever, of the three Sunday schools established at Halifax, in equal shares and proportions; and upon further trust, to lay out in their names, at interest, the sum of 60*l.* and to apply the interest thereof from time to time, for ever, in maintaining and keeping in repair the family vaults or tombs of the late Benjamin Holt, J. Holt, and William Holt; and to pay all the rest, residue and remainder of the moneys, to arise from the sale of her real estates, unto J. Ratcliffe, for his own use and benefit. The testatrix then disposed of her personal estate by giving several legacies, and bequeathing the residue to J. Ratcliffe for his own use.

On the 18th of August 1814, the testatrix died, leaving Thomas Holt, her brother, her heir at law.

Thomas Holt, by his will, dated the 22d of July 1818, directed, that as to any estate or interest which, by virtue of the will of his late sister Nancy Holt, was vested in him, or which, from construction of law, he might be entitled to as contingent, in remainder, reversion, or otherwise howsoever, all interest or profits thereof should be for the use and benefit of the plaintiff, Grace Holt, for her widowhood; and after her decease or second marriage, he gave all such estate or estates, and interest, to the plaintiff, J. G. Jones, for his own use and benefit; and he also gave all the residue of his real and personal estates to J. G. Jones, his heirs, executors and administrators, and appointed him and Grace Holt executor and executrix of his will.

In May 1820, T. Holt died, without issue. After his decease, Mitchell and Bradley, (Garlick being then \*dead,) sold the real estates [\*292] which Nancy Holt had directed to be sold, for 1,465*l.* J. G. Jones and Grace Holt then filed a bill against the trustees and J. Ratcliffe, charging that the bequest of the sum of 800*l.* to the charitable uses, contained in the will of Nancy Holt, was void, and that they were entitled to it as Thomas Holt's personal representatives; and they prayed, that Mitchell and Bradley might be decreed to pay that sum to them, out of the proceeds of the sale of Nancy Holt's real estates.

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Ratliffe, by his answer, insisted that the legacy of 800*l.* was void under the 9 Geo. 2, c. 36, and sunk into the residue of Nancy Holt's estate, for his benefit.

Mr. Hart, Mr. Bell, and Mr. Duckworth, for the plaintiffs, cited *Cruse v. Barley* ;(a) *Hutcheson v. Hammond* ;(b) and *Wright v. Wright*.(c)

Mr. Cooper, for the defendant Ratliffe :—The case of *Wright v. Wright*, has no application, for the question in that case was a question of conversion ; here the question is, whether this legacy of 800*l.* does or does not fall into the residue ? Under this gift of the residue of the produce of the real estate, the defendant Ratliffe is entitled to this legacy. *Durour v. Motteux*.(d) [\*293] \**Ackroyd v. Smithson*.(e) In the latter of these two cases, the question arose between the heir at law and the next of kin, and it was ad-

(a) 3 P. W. 20.

(b) 3 Bro. C. C. 128.

(c) 16 Ves. 188.

(d) 1 Ves 320.—The will in this case is not correctly stated in the report, and as questions as to the conversion of real into personal estate depend upon the particular expressions of the instruments under which they arise, the register's book has been consulted, and the following statement of the will extracted from it.

Reg. Lib. 1749, A. fol. 253.

Timothy Motteux, by his will, gave all his estate, consisting in a freehold and some leasehold, moneys, securities, bonds, stocks, debts, both at home and abroad, goods in trade, both at home and abroad, household goods, plate, jewels, linen, wearing apparel, and all he had, or might have, or claim to, of what kind soever, or wheresoever, upon trust to sell and dispose of all his freeholds, leaseholds, moneys, securities, bonds, stocks, debts, both at home and abroad, goods in trade, both at home and abroad, household goods, plate, jewels, linen, wearing apparel, and all he had, or might have, or claim to, of what kind soever or wheresoever, and after payment of all his debts, funeral expenses and legacies, to put or place out all the residue of his personal estate at interest, upon government or other securities, in the names of his trustees, upon trust that they should pay and apply the interest and produce arising thereby between the persons therein after mentioned, during their joint lives ; and, after the death of either of them, then to pay to the survivors also during their joint lives ; and, after their death, then to pay the whole produce to the last survivor for life ; and then to pay and apply the said residue and the principal, unto and amongst the respective children, lawfully begotten, of those he had thereafter mentioned, to be entitled to a share of the interest or produce of the overplus, to be equally divided. The testator then gave several legacies, some to individuals, and others for charitable purposes, and amongst them the legacy of 12,000*l.* mentioned in the report ; and the remainder of his estate and the interest thereon, being placed out at interest in some of the funds, the yearly interest, be it what it would, the testator ordered to be paid quarterly to and amongst the following persons, if alive, share and share alike ; (if any should sell or transfer their right to it, then, in such case, that person or their representative to be cut off and go amongst the rest.)—to the plaintiff P. Motteux, jun. one full quarter part ; to the plaintiff Stephen Hubert, one full quarter part ; to the defendant Susannah Jarvis, one full quarter part, and to the defendant Magdalen Foulle, one full quarter part : to these two last to be paid into their own hands, on their own receipts, so that their husbands might have no right to it ; and, after the decease of the longest liver of the said four, or of those that should not have alienated their claim, he desired that the principal of the residue of his estate should be divided and go to and amongst the children gotten, or to be begotten, by the said plaintiffs P. Motteux, jun. and Stephen Hubert, and the defendants Susannah Jarvis and Magdalen Foulle, as was before explained ; and he appointed the plaintiffs Francis Motteux, James Daniel Hubert, Stephen Hubert and P. Motteux, jun. executors of his will. [See explanation of, and criticism upon, this case by Lord Brougham in *Amphlett v. Parke*, 2 Russ. & Mylne, 221.]

(e) 1 Bro. C. C. 502.

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mitted that there was \*a distinction between a claim made by resi- [\*294]  
duary legatees and one made by the next of kin. So also in *Wil-*  
*liams v. Coade*, (f) the question was between the heir at law and the next of  
kin; but both in the argument and the judgment a distinction was drawn be-  
tween the residuary legatee of the produce of real estate and the next of kin.  
The case of *Durour v. Molteux* was followed in *Kennell v. Abbott*. (g)

The VICE-CHANCELLOR:—The will, as to personal estate, speaks at the  
time of the death of the testator, and the residuary legatee takes, not only what is  
undisposed of by the expressions of the will, but that which becomes undis-  
posed of at the death, by disappointment of the intentions of the will.[1] It is  
otherwise as to the residuary devisee of real estate, or of the price of real  
estate. As to him, the will speaks only at the time of making it, and he can  
take nothing but what is at that time intended for him. The devisor, at the  
time of making the will, intended that the residuary devisee of the price of the  
land should take such residue, subject to the deduction of the 800*l.*, and not  
the 800*l.*; which is therefore undisposed of, and results to the heir.[2] In  
*Durour v. Molteux*, the devisor included the residuary price of his land in  
the general gift of all his personal estate, and therefore it was contended that  
it was the purpose of the testator that it should pass as his residuary personal  
estate would do. (h)

This cause having been set down for the purpose of \*the costs [\*295]  
being disposed of, Mr. Cooper contended that they ought to be paid  
wholly out of the 800*l.*, and he cited *Jenour v. Jenour*. (i)

(f) 10 Ves. 500..

(g) 4 Ves. 802.

(h) All the cases upon the subject of the conversion of real into personal estate, are considered  
in *Smith v. Claxton*, 4 Madd. 484.

(i) 10 Ves. 562.

[1] Vide *Cook v. Stationer's Company*, 3 Mylne & Keen, 262; *James v. James*, 4 Paige, 115.  
*O'Brien v. Heeney*, 2 Edw. 212; Amer. Ch. Digest, Devise, III. IV.

[2] Vide *Smith v. Edrington*, 8 Cranch, 66; *James v. James*, 4 Paige, 115; *Van Kleeck v. New*  
*York Dutch Church*, 20 Wend. 457, S. C. 6 Paige, 603; *Wood v. Keyes*, 8 Paige, 365.  
Where real estate is directed to be sold, and the testator wills that a sum of money shall be applied  
to a particular purpose, and the residue of the produce of sale only is given to A. and the particular  
purpose fails either by lapse, or because it is void at law, then the heirs and not A. will take the  
money, because the whole is real estate at the death of the testator, and A. can take no more of  
that estate than is expressly given to him; namely the residue of the real estate after deducting the  
sum of money. Where real estate is not directed to be sold, and the residuary devise is not of  
the produce but of the corpus of the real estate, there the question arises between the heir at law,  
and the devisee as to the intention of the testator. If the devise to a particular person, or for a  
particular purpose, is to be considered as intended by the testator to be an exception from the gift  
to the residuary legatee, the heir takes the benefit of the failure. If it is to be considered as intend-  
ed by the testator to be a charge only, upon the estate devised, and not an exception from the  
gift, the devisee would be entitled to the benefit of the failure; Sir Launcelet Shadwell, Vice-Chan-  
cellor, in *Cook v. The Stationer's Company*, 3 Mylne & Keen, 262. Where there was a devise  
to the testator's wife of a house and lot, for life, in lieu of dower, with a devise to trustees, of the  
residue of his estate not devised to his wife, and she elected to take her dower, it was held that the

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The VICE CHANCELLOR :—The question does not arise upon the 800*l.*, but upon the construction of the residuary clause in the will ; for the 800*l.* is clearly a lapsed legacy : and the justice of the case requires that the costs of this suit should be born proportionably by the 800*l.*, and the surplus produce of the real estates after paying the 800*l.* I must therefore order, that the costs of all parties shall be paid, in the first place, out of the produce of the real estates, and then that a fair proportion of them be deducted out of the 800*l.* [3]

house and lot, subject to the right of dower, descended to the heirs of the testator, and did not go to the trustees. *James v. James*, 4 Paige, 115. "The general principle appears to be, that the heir must be effectually displaced, that he is not to be displaced by inference or implication, but, that there must appear a clear, substantive and undeniable intent on the part of the deviser or testator. And the executors will hold as a resulting trust, whatever would have gone to the heir at law if he had not been excluded, the proof lying on the residuary legatee to displace the heir and substitute himself. Accordingly all these cases turn, as they naturally must upon what the particular will has done. The inquiry upon these rules always is, has the heir at law in each individual case, been sufficiently removed to let in the residuary legatee to that, which, whether it continues to be land, or whether it has been converted for a specific purpose into money, is only money until the purpose is answered or fails, and which in the latter case as a resulting trust, will then revert to the heir at law. I agree in holding that a testator may provide, not only that the undisposed residue, which is strictly personal, shall go to the residuary legatee, but that all lapsed legacies of whatever nature shall also go to him ;—and if he can do it by express words, he can do it by plain and obvious intention, to be gathered from the whole instrument." Lord Brougham, in *Amphlett v. Parke*, 2 Russ. & Mylne, 221, where the decision of the Vice Chancellor (S. C. 1 Sim. 275,) was reversed ; and it was held that where a testatrix gave her real estates upon trust to be sold, and directed the moneys to arise from such sale to be considered and taken as part of her personal estate ; then willed that out of the moneys arising from such sale, and out of all other her personal estate, certain pecuniary legacies should be paid ; and bequeathed all the residue of her personal estate, and the moneys arising from the sale of her real estates to trustees ; and some of the pecuniary legatees having died in the life time of the testatrix ; it was held that the conversion of the real estate into personal, was not absolute, but partial only, for the purpose of making good the pecuniary legacies, and that such of those legacies as had lapsed, in so far as they were payable out of the produce of real estate, had lapsed for the benefit of the heir at law. In a subsequent case, before Sir John Leach, master of the rolls, the testator devised real estate to his executors upon trust for sale, and then declared his will to be, that the moneys which should arise from the sale thereof should be deemed to be part of his personal estate, and that the rents and profits until sale, should from and immediately after his decease, be part of the annual income of his personal estate, and should be subject to the same disposition as the personal estate ; and devised the same residue of the produce of his real estate when converted into money, in equal shares to five persons, who were also his next of kin, one of whom having died in the life-time of the testator, it was held that the share thus lapsed went to the residuary legatee and not the heir at law. *Phillips v. Phillips*, 1 Mylne & Keen, 649. See further *Green v. Jackson*, 5 Russell, 33. S. C. 2 Russ. & Mylne, 233. *Henchman v. The Attorney General*, 3 Mylne & Keen, 485. As to conversion of realty into personalty, vide *Gott v. Cooke*, 7 Paige, 521.

[3] Vide *Birdsell v. Hewlett*, 1 Paige, 33. *Tibbitt v. Tibbitt*, Jacob, 317.

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 1823.—Parker v. Fairlie and others.
 

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WILLIAM PARKER and JAMES DOWIE, plaintiffs, and WILLIAM FAIRLIE, JOHN HUTCHESON FERGUSON, DAVID CLARK, PETER REIFERSON, JOHN MELVILLE, and JOHN SMITH, defendants.

1823, 10th March, and 17th April.—*Answer*.—*Impertinence*.

A defendant in answer to an allegation in the bill that some cotton which had been sent by him to the plaintiffs was of inferior quality, said, that from certain affidavits and certificates made by experienced persons, he believed the cotton to be of a superior quality, and set forth the affidavits and certificates, in a schedule, in *læc verba*: held, that the schedule was not impertinent.

THE plaintiffs were the surviving partners of the house of Parker, Yeoward & Co. merchants, of London; which house had, in the years 1817 and 1818, been engaged in various mercantile transactions with the defendants, then carrying on business as merchants at Calcutta, under the firm of Fairlie, Ferguson & Co. \*The plaintiffs' house having, by letter, in- [\*296] structed the defendants to purchase and send home on their account cotton, the produce of the East Indies, the defendants in the year 1818 shipped, on account of the plaintiffs' house, a certain quantity of cotton on board a vessel belonging to that house, then on her return voyage to England. But the plaintiffs contended, that in the purchase of such cotton, the defendants had deviated from the instructions given them, in respect to both the quality and the price of the article. The cotton came home, and was sold by consent and without prejudice, and a considerable loss was incurred by the sale.

The bill prayed, in substance, that an account might be taken of the several dealings and transactions between the two houses, and of the goods shipped and consigned by the house of the plaintiffs to the defendants, and of the produce of the sales thereof; and of the several sums of money received or paid by the defendants on account of the plaintiffs' house from the 1st of January 1818; and that in taking such accounts the defendants might not be allowed to charge the plaintiffs' house with the cost of the cotton in question, beyond the amount of the net proceeds of the sale; and that the defendants might be decreed to pay to the plaintiffs what might be found due to them upon taking such accounts, (the plaintiffs being willing to make to the defendants all just allowances, and to pay what, if any thing, was due to them), and that, in the mean time, the defendants might be restrained from proceeding against the plaintiffs at law in respect of the cotton.

The bill, after setting out the written instructions from the plaintiffs' house to the defendants, charged, (among other things) that the cotton in question was of \*a very inferior quality, and could not even be [\*297] considered as fair ordinary cotton, and described the same as very leafy and of a bad color. The corresponding interrogatories were: "whether such cotton was not of very inferior quality, or how otherwise? and whether the same could be considered, or was, in fact, fair ordinary cotton? And whether such cotton was not leafy and of a bad color.

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The defendant Fairlie, by his answer, stated that he had not at any time during the dealings and transactions between the said two houses, or during the years 1817 and 1818, had any personal concern in, or any cognizance of, the said dealings and transactions, he having been from the year 1810 up to the then present time resident in this country. He also admitted, in reference to a statement to that effect in the bill, that the defendants Clark, Reiersen, Melville, and Smith, were respectively resident at Calcutta, or elsewhere, out of the jurisdiction of the court; and to the interrogatories above cited he answered as follows:—

“ And this defendant further answering, positively denies, as to his information and belief, that such last mentioned cotton was of a very inferior quality; and on the contrary, he believes the same would be considered, and was in fact superior to fair ordinary cotton, and was so held and considered accordingly; and as evidence thereof, this defendant saith, that he hath received divers certificates and affidavits, which, since the raising of the question now pending between the said firms of the said complainants, and Fairlie, Ferguson & Co. respectively, the said other defendants, now in India, have caused to be duly made there, by divers persons, who, (as this defendant has [\*298] been \*informed and believes,) were well acquainted with such last mentioned cotton, at or about the time of the same being so bought on account of the said complainants said firm as aforesaid, or with other cotton of the same sample, and are experienced in and well acquainted with, and good and competent judges of the article of cotton in general, as grown in the East Indies; and certain of which affidavits in particular this defendant saith were made by the persons employed in the process of packing and screwing down the said cotton for shipment; in which process, this defendant saith, every part and single pound of the article doth and must necessarily undergo the minutest inspection and examination, and is in fact far more accurately inspected and judged of than it can possibly be by the most skilful broker or other persons or person in London, judging of the contents of entire bales of the article from small or comparatively small samples thereof; and that such persons do, in their said several certificates and affidavits, give their opinions and judgments respectively, as to the qualities or price of the said cotton; and from such affidavits, this defendant doth collect and confidently believe that such cotton was superior to a fair ordinary quality, and to be classed with the best description of Bengal cotton procurable in Calcutta at the time, and was of a fair and reasonable price, or to the like effect. And this defendant saith he hath, in the second schedule to this his answer annexed, and which he prays may be taken as part thereof, set forth fully and at large the words and figures, and all and every the contents and particulars of the said several certificates and affidavits respectively, with the names and descriptions of the several persons by whom the same, and every of them, were and was respectively made or [\*299] sworn. And this defendant also positively \*denies, as to his information and belief, that such cotton was leafy and of a bad color.”

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The affidavits and certificates referred to contained attestations, by persons who stated themselves to be acquainted with the qualities and value of cotton the produce of the East Indies, to the goodness of different parts of the cotton in dispute; but one of them also spoke to the quality of certain sugar which the defendants had consigned home to the plaintiffs' house in the same cargo with the cotton, and about which some question subsisted, though not in this suit. There was also an affidavit from the defendant Clark, the leading partner of the defendants' house in India, identifying the cotton mentioned in the certificates and in the other affidavits, with that mentioned in the invoice and account current annexed to his affidavit, that is, with the cotton in question in this suit. The invoice, likewise, was set out in the schedule; and it stated the particulars, not only of the cotton, but of the sugar and other articles comprised in the same cargo, as well as certain charges for Coolie hire, and other expenses, and for commission, not mentioned to belong particularly to the cotton, but appearing to relate to the whole cargo. Further, there was set out in the schedule an attestation by a notary public, verifying the several affidavits in the usual manner.

The answer having been excepted to for impertinence, the master (among other things) reported the whole of the schedule in question to be impertinent. The defendant Fairlie thereupon filed exceptions to the master's report; one of which was for having reported the schedule impertinent; and that exception now came on to be argued.

\**Mr. Bell, and Mr. Grant, in support of the exceptions.*

[\*300]

*Mr. Horne, and Mr. Palmer, for the report.*

In answer to an inquiry from the Vice-Chancellor, whether any parallel reported case could be produced, the counsel on both sides said that they were not aware of any such case. His honor having also observed that the first mention of the certificates and affidavits in the answer was introduced with the words "as evidence," the counsel for the defendant pointed out the subsequent passage in the answer, in which it was stated, "that from such affidavits the defendant positively believed that the cotton was superior to cotton of a fair ordinary quality, and to be classed with the best description of Bengal cotton procurable in Calcutta at the time, and was of a fair and reasonable price."

The VICE-CHANCELLOR :—The master has considered this matter as impertinent, not because it is irrelevant, but because he thinks it useless. He has not considered it impertinent that the defendant should refer generally to the affidavits and certificates in question, as forming the grounds of his belief with respect to the quality of the cottons; for he has permitted the passages in the answer to that effect to stand unimpeached; but he considers it impertinent, that is, useless, to state the very language of the affidavits and certificates. I concur with the master in thinking that the defendant was well justified in referring to the affidavits and certificates, as forming the grounds of his belief, and adding weight and credit to it; but as the degree of weight and credit depends upon the particular language of the affidavits and cer- [\*301]



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tificates, I cannot think it useless, on the part of the defendant, to set them forth in *hæc verba*.

Exception allowed.[1]

### SILCOX v. BELL.

1823, 11th March.—*Will.—Construction.—Devise to first and second cousins.*

Where the decree referred it to the master to inquire whether a testator left any relations of the degree of first or second cousins; held that first cousins, twice removed, ought to be included in the report.

WILLIAM READ, deceased, by his will, duly executed to pass freehold estates, gave freehold, copyhold, and leasehold estates to trustees upon certain trusts, for the benefit of the children of his nephew William Bell: And in case there should be no children of his nephew William Bell, then upon trust to sell and dispose of those estates, and to pay and divide the moneys arising by such sales, after deducting the expenses of the trusts, unto and amongst his several relations therein named; and in case there should be any other relations of his that could prove themselves, to the satisfaction of his trustees and executors, to be either the first or second cousins to him, or the representatives of such first or second cousins, he directed that his trustees and executors should consider them as actually entitled with those whom he had particularly described, and that they should pay and distribute their respective shares and proportions to them in such manner, at the same time, and in such shares and proportions as he had in his will directed respecting his other relations therein by him particularly mentioned and described. And the testator devised the copyhold estate which he purchased of F. Fane, esquire, to the same trustees, and to the survivors of them, and the heirs, executors, administrators and [\*302] \*assigns of such survivor, upon trust to sell and dispose of the same, and out of the money arising therefrom, after paying the expenses attending the sale and the trusts thereby created, to pay and divide the residue

[1] Affirmed 1 Turn. & Russ. 362. As to impertinence in an answer, vide *Woods v. Morrell*, 1 Johns. Ch. Rep. 103; *Lewis v. Wilson*, 1 Edw. 305; *Love v. Williams*, 2 Sim. & Stu. 574. As a general rule, a schedule containing copies of vouchers, receipts and other documents which may be given in evidence is impertinent; but an account, however long, if called for by the bill, is not. *Scudder v. Bogert*, 1 Edw. 372; *Jolly v. Carter*, 2 Edw. 209; *Webster v. Threlfall*, 2 Sim. & Stu. 190. Exceptions for impertinence must be supported *in toto* or fail altogether; and an exception will be overruled, if it includes any one passage which is not impertinent. *Desplaces v. Gorris*, 1 Edw. 350. Whether relevant matter is impertinent, vide *Parker v. Fairlie*, 1 Turn. & Russ. 362. It is impertinent in the answer to an amended bill to repeat the whole matter of the former answer. *The Bennington Iron Co. and others v. Campbell and others*, 2 Paige, 159. When new matter not responsive to the bill is introduced, the complainant may except to the answer for impertinence, or may raise the objection at the hearing. *Stafford v. Brown*, 4 Paige, 28. As to impertinence in a bill, vide *Hawley and others v. Wolverton*, 5 Paige, 522.

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of the moneys arising by such sale, unto and amongst his several relations thereinbefore particularly named and described, and such other of his relations as should prove themselves to be his first or second cousins as aforesaid, in equal shares and proportions.

By the decree made on the hearing of this cause, the master was ordered to inquire and state to the court, (amongst other things) "whether the testator left any relations of the degree of first or second cousins, or representatives of such first or second cousins."

The master, by his report, certified that four persons, whom he mentioned by their names, and who appeared from their pedigrees, which he stated in his report, to be the great-grandchildren of the testator's uncles and aunts, were the second cousins of the testator living at his decease.

To this report, the plaintiff *Silcox* excepted.

*Mr. Horne* and *Mr. Ellison*, in support of the exception, contended that, by the decree, the master was directed to inquire only who were the first and second cousins of the testator; and that the persons named in his report, were neither the testator's first nor his second cousins.

*Mr. Sugden* and *Mr. Roupell*, in support of the master's report:—The case of *Mayott v. Mayott*,<sup>(a)</sup> has established, \*that it is not mate- [\*303] rial by what name the relations are designated, provided they are within the degree of relationship which the testator meant to include in his bequest. The court had that in view in making the decree; because it did not refer it to the master to inquire who were the testator's first and second cousins, but who were of the degree of first and second cousins to the testator. As the rule is, in ascertaining the degree of relationship in which one person stands to another, to count up to the common ancestor, and then down again to the person whose relationship is sought, the first cousin twice removed, is related to the *propositus* in the same degree as his second cousin: for they are both in the sixth degree; and therefore, in point of propriety of language, as well as in law, all persons who are of the sixth degree are second cousins.

The VICE-CHANCELLOR:—The master is wrong in the terms of his finding; for these persons are not the testator's second cousins, but his first cousins twice removed: and I must, therefore, allow the exception. But as I am of opinion, that all persons who are within the degrees of relationship mentioned in the will, are within the intention of the testator, I shall, at the same time, make a declaration, that the persons named in the report are of the degree of second cousins.[1]

(a) 2 Bro. C. C. 125.

[1] But a bequest to the testator's "first cousins, or cousins german," does not include the descendants of first cousins; *Sanderson v. Bayley*, 4 Mylne & Craig, 56.

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[\*304]

\*WHEELER v. WARNER and others.

1823, 15th March.—*Will.—Legacy upon marriage with consent.*

I. W. bequeathed 10,000*l.* stock to trustees, in trust to pay the dividends to his daughter whilst she remained single; and provided she married with the consent of his trustees, he authorized them to advance to her husband such part of the stock (not exceeding one-third) as they thought proper, and he declared certain trusts of the remainder for the benefit of his daughter and her children. But if she married without the consent of the trustees he declared certain trusts of the whole fund, for the benefit of his daughter and her children. She married in I. W.'s lifetime, and without his consent, but he was afterwards reconciled to the marriage; held that the husband was entitled to one-third of the stock, and that the remainder was to be held upon the same trusts as it would have been had the daughter married after I. W.'s death, and with the trustees' consent.

ISAAC WARNER, by his will, dated the 7th of August 1818, after giving 4,000*l.* to his wife Mary Warner, and his son Simeon Warner, upon certain trusts, for the benefit of his daughter Mary Allen and her children, gave to the same persons 10,000*l.* three per cent reduced annuities, upon trust to pay the dividends thereof to his daughter Sophia Warner, during such part of her life as she should remain single, and until she should be married with the consent of his wife and son, or the survivor of them, and such consent should be certified in writing. And he declared that, in case his daughter Sophia should at any time after his decease, with the consent and approbation of his wife and son, or the survivor of them, (such consent to be certified by some writing under their hands) intermarry with any person to be approved of as aforesaid, then his trustees, or the survivor of them, his or her executors or administrators, should transfer and pay to the person to whom she should be so married, with such consent as aforesaid, such part of the 10,000*l.* three per cent reduced annuities, and other the moneys or securities to which she should then be entitled under his will, as his trustees or trustee should think fit, (so that the same did not exceed one-third part thereof,) for the sole use of such husband; and after the marriage of his daughter Sophia, with such consent and approbation as aforesaid, and, after such payment or transfer to her husband, to pay the interest and dividends of the residue of the money so invested, or to

[\*305] which she might thereafter be entitled \*under his will, into her proper hands, so that such interest and dividends might be for her sole use, and at her disposal amongst her children by her said husband, or any after-taken husband, at such time or times as therein mentioned respecting Mary Allen's children: and upon further trust, in case such marriage of his daughter Sophia should be so had and solemnized with such consent as aforesaid, and she should die in the lifetime of any such husband, then, after her decease, to pay the interest and dividends, last mentioned, into the proper hands of such husband, during his natural life, or so long as he should remain solvent, and be permitted to receive the same for his own use; and, after the decease of his daughter Sophia, and any such husband to whom she should have been married with such consent as aforesaid, or from and after the insolvency of

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any such husband, or his becoming incapable, by assignment or other act of law, of receiving such dividends or interest for his own use, then to transfer, pay and divide the whole of the money so invested or set apart for his daughter Sophia, and all interest then due and unexpended, unto and amongst such of her children, by any husband or husbands with whom she should intermarry with such consent as aforesaid, as should be living at her decease, and as she should, in the manner therein mentioned, appoint: and in default of any such appointment by her after any such marriage, or in case of any defect therein, then upon trust, as soon after the decease of his daughter Sophia, after such marriage, as circumstances would permit, to divide the trust funds amongst her children who should attain the age of twenty-one years. But in case his daughter Sophia should be married without such consent as aforesaid, then he declared that his trustees should, from and after any such marriage without such consent and approbation,\*pay, from time [\*306] to time, the whole of the interest and dividends of the 10,000*l.* three per cent reduced annuities, into her proper hands, during her life, as if she were single and unmarried, and notwithstanding any such marriage; and from and after any such marriage of his daughter Sophia without such consent as aforesaid, and from and after her decease, then to pay, transfer and divide the trust funds to and amongst her children who should attain the age of twenty-one years. And he gave the residue of his estate and effects to the same trustees, in trust to sell and dispose of such parts thereof as should be in their nature saleable, and get in all other his moneys and securities for money; and he directed, that the money arising from such sales, and so to be got in, should be equally divided amongst his son Simeon and his daughters Mary and Sophia, but that, nevertheless, the shares of his daughters should be invested in government securities, in addition to the sums of 4,000*l.* and 10,000*l.* before directed to be invested for their separate use and disposal; and that their shares should be subject to the same limitations, as had been before mentioned respecting the stocks or funds so given or settled upon or for them respectively; and he appointed his wife and son executrix and executor of his will.

On the 22d of January 1822, the testator died.

Sophia Warner, in the lifetime of her father, and after he had made his will, intermarried with Robert Wheeler, and after her father's death, she with her children filed a bill against the trustees of her father's will, her husband, and Mr. and Mrs. Allen and their children, for the purpose of having the usual accounts taken of \*her father's personal estate, and the rights [\*307] and interests of all parties therein ascertained and declared.

The bill stated, that the marriage of Mr. and Mrs. Wheeler was had with the consent of the testator. But the trustees, in their answer, denied that statement; and added, that the marriage was had without even the knowledge of the testator, but that they believed he was afterwards reconciled to Mr. and Mrs. Wheeler and to their marriage; and they said, that they had divided the residue of the testator's personal estate into three equal shares: that Simeon

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Warner had appropriated to himself one of such shares; that they had transferred into their own names another of such shares, upon the trusts declared by the will, for the benefit of Mr. and Mrs. Allen and their children; and that the remaining share, and also the sum of 10,000*l.* bank three per cent annuities, were then standing in the testator's name, in the books of the governor and company of the bank of England, to abide the decision of the court.

By the decree, it was referred to the master to inquire, whether Mr. and Mrs. Wheeler's marriage was had with the consent of the testator; and if not, whether it was subsequently approved of by him, or whether he was afterwards reconciled thereto.

The master, by his report, found that the testator and his wife had, for many years previous to the year 1818, been on very friendly terms with Mr. Wheeler's family; and that, in October 1818, it was arranged between the parents of both parties, that the plaintiff, Mrs. Wheeler, should go to [\*308] visit Mr. Wheeler's family \*at Birmingham, where they resided; but that when the period of her departure arrived, the arrangement was objected to by Mrs. Warner, who observed that she was aware of the attachment that existed between Mr. Wheeler and her daughter; and that, if she was permitted to go to Birmingham, a marriage would be the consequence; but the testator said, he had promised his daughter she should go, and that he would not disappoint her: that Mr. Wheeler, before Mrs. Wheeler went to Birmingham, had visited at the testator's house, and staid there for several days at a time, with the testator's knowledge and approbation; that in January 1819, the plaintiff, Mrs. Wheeler, went on her visit to Mr. Wheeler's family, and that in March following the marriage took place, without either party having asked their parents' consent. And the master also found, that in May, and again in August in that year, Mr. and Mrs. Wheeler, in consequence of invitations from the testator, went and staid at the testator's house, and were treated by him and his wife in every respect as members of their family, and that Mr. Wheeler was introduced by them to their friends and acquaintance as their son-in-law; and that the testator, then and before, appeared reconciled to the marriage, and approved thereof. And the master found a variety of other facts, from which it clearly appeared that a friendly intercourse subsisted between the testator and Mr. and Mrs. Wheeler down to the time of the testator's decease; and he certified, that the marriage was not had with the testator's consent; but that it was subsequently approved of by him, and that he was afterwards reconciled thereto.

The cause now came on to be heard for further directions.

[\*309] \*Mr. *Wingfield*, and Mr. *Wigram*, for the plaintiffs:—The question is, whether, if a father gives a fortune to a child, and annexes, as a condition to the gift, that she shall marry with consent, and she marries without consent, but the father afterwards approves of the match, the court will say that the marriage was had with the father's consent? It may be said, that under the circumstances of this case, this lady's fortune is to be subject to the

1823.—*Warner v. Wheeler* and others.

same trusts as if she had married after her father's death, with the consent of the trustees; for as she married in her father's lifetime, it was impossible that she should have had the consent of the trustees, and that therefore she cannot be said to have married without their consent. But the testator may have considered that the event which had happened was provided for by his will; and may, under that impression, have forbore to alter his will.

*Mr. Sugden, and Mr. W. Blackburn, for the defendant, R. Wheeler:—*The case of *Parnell v. Lyon*,<sup>(a)</sup> is directly in point, and entirely disposes of the question in this case. The marriage which the testator contemplated was a marriage after his death. The case here is rather stronger than if the father had merely been reconciled to the marriage after it had taken place; for it appears, by the master's report, that the father knew of his daughter's attachment to Mr. Wheeler, and that although he was cautioned against permitting her to visit his friends at Birmingham, yet he said he would not disappoint her. *Clarke v. Berkeley*.<sup>(b)</sup>

\**Mr. Bell, and Mr. Rose, for the trustees:—*The testator in this [\*310] case himself points out the alterations which are to be made in the disposition of the property, in case his daughter marries without consent. He says, "If she marries without consent, I give the income to her for her life, and after her death, the capital to her children absolutely." So that he does not entirely deprive her of the property in case she marries without the consent of his trustees. Now in *Parnell v. Lyon* there was a clause, by which the principal of the daughter's share of the residue was taken away from her children if she married without consent. Here there was no consent, but there was a reconciliation; and that is quite consistent with a qualified gift. And the testator most probably considered that his subsequent reconciliation would not have the same effect as to the disposition of the property, as if the marriage had been had with his consent. Besides, this case has one ingredient in it which distinguishes it from all the cases that have been cited; for here the will leaves it in the discretion of the trustees, in case the daughter marries with their consent, to advance to her husband any part of her fortune not exceeding one-third. That discretion the trustees are still entitled to exercise.

*Mr. Hart, and Mr. Barber, for the defendants Mr. and Mrs. Allen.*

The VICE-CHANCELLOR:—The authorities cited establish this proposition: That a marriage in the lifetime of the father, with his consent or subsequent approbation, is equivalent to a marriage after his death with the consent of the trustees; [1] and the directions must be given according to the provisions of the will in that event. Here the trustees have a discre- [\*311] tion, in the event of a marriage with their consent, to give to the husband any portion of the 10,000*l.* stock, not exceeding a third part. But this discretion in the trustees is incident only to their authority to consent to the

(a) 1 V. & B. 479.

(b) 2 Vern. 720.

[1] Vide *Smith v. Cowdery*, 2 Sim. & Stu. 358.

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 1823.—Webber v. Webber.
 

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marriage; and this provision is now to be considered as a gift to the husband of one-third part of the 10,000*l.* stock.

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WEBBER v. WEBBER.

1823, 30th March, and 3d May.—*Contingent legacy.*

Where a legacy is given upon a contingency, and a suit is instituted for the administration of the testator's estate, the court does not direct a sum of stock, belonging to the estate, to be appropriated to pay the legacy when the contingency happens; but directs the whole residue to be paid over to the residuary legatee on his giving security to pay the legacy when due.

WILLIAM WEBBER, by his will, dated the 21st of December, 1794, gave to each of his daughters, Sarah and Mary Elizabeth, the sum of 10,000*l.* on their respective marriages. And in case their mother should die before they were married, then after her decease he gave them an annuity of 1,200*l.* to be equally divided between them, so long as they both continued unmarried; and after the marriage or death of either of them, after the death of their mother, he gave to the other, in lieu of her moiety of the annuity of 1,200*l.* an annuity of 8,000*l.* so long as she continued unmarried.

Sarah Webber, one of the daughters, married in the testator's lifetime. In November, 1796, the testator died, leaving Sarah Webber, his widow, and his two daughters surviving.

A suit having been instituted for the administration of the testator's personal estate, and the master having reported that all the testator's debts and legacies, except the 10,000*l.* given to M. E. Webber, had been [\*312] \*paid; and that 16,000*l.* bank three per cent annuities, part of the funds in the cause, were, according to the market price of such annuities on the day mentioned in his report, of the value of 10,000*l.* that sum was carried over to Miss Webber's account, subject to the contingencies mentioned in the will concerning her legacy.

On the 6th of May, 1819, Sarah Webber, the widow, died, upon which Miss Webber presented a petition, insisting that, in the events that had happened, she was entitled, under her father's will, to an annuity of 800*l.* Upon this petition an order was made, directing two sums of 13,333*l.* 6*s.* 8*d.* bank annuities, part of the funds in the cause, to be appropriated to answer the annuity.

Under these circumstances a petition was presented by some of the other parties to the suit submitting that, as Miss Webber could not be entitled both to the legacy and the annuity, the two sums of 13,333*l.* 6*s.* 8*d.* bank annuities, would at all times be a sufficient fund to answer the legacy as well as the annuity; and therefore praying that the accountant-general might be ordered to carry over the 16,000*l.* bank annuities from Miss Webber's account to the credit of the cause generally; and that it might be declared that the two sums

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 1821.—Turner v. Robinson and others.
 

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of 13,333*l.* 6*s.* 8*d.* bank annuities, should be a fund for answering, not only the annuity of 800*l.*, but also the legacy of 10,000*l.*

Mr. Bell, and Mr. Farrer, for the petitioners.

The VICE-CHANCELLOR :—This legatee being entitled to receive a certain sum \*in money when the event of her marriage happens, her [\*313] legacy is not capable of being secured by the present appropriation of any sum of stock. Let the residuary legatee receive the whole fund in court upon giving security to the satisfaction of the master, for the payment of the legacy if the event happens. It may be secured upon land if he has land, or by a loan of money upon land.[1]

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TURNER v. ROBINSON and others.

1821, 27th March.—*Multifariousness.*

Where under a will the residuary legatees are also appointees of a share of another testator's estate a bill filed by them for an account of both estates, is not multifarious.

WILLIAM WOOLCOTT, deceased, by his will, after giving several legacies, bequeathed the residue of his estate to trustees, upon trust, within one year after his youngest child should attain the age of twenty-one years, to sell and dispose thereof, and to divide the moneys arising from the sale equally amongst all his children, share and share alike; and he directed that the shares of such of them as were sons should be paid to them as soon as such shares could be ascertained, and that the shares of such of them as were daughters should be laid out on government or real securities, in the names of his trustees, upon trust to pay and apply the interest and dividends arising therefrom for their separate use; and that their shares of the capital stock or principal money should be disposed of, after their decease, to such persons as they, by any deed or writing under their hands and seals to be duly executed, or by their last will and testament in writing to be executed in like manner, should appoint.

The testator left ten children surviving him. Mrs. Esmand, one of those children, and the mother of the plaintiffs, Mrs. Turner and Miss Esmand, by her will, \*(which was executed so as to be a due exe- [\*314] cution of the power given to her by her father's will,) disposed of all her interest, to be derived under that will, in favor of Mrs. Turner and Miss Esmand and also gave them the residue of her own personal estate.

The bill was filed against the personal representatives of both William Woolcott and Mrs. Esmand, and against the surviving children of the former; and, after stating the wills of W. Woolcott and Mrs. Esmand, it contained the usual charges as to their personal estates, possessed by their respective personal representatives, and prayed that the trusts of those wills might be carried into execution; that an account might be taken of W. Woolcott's personal estate

[1] Vide 1 Story's Eq. 561.



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 1822.—*Jones v. Croucher and others.*


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possessed by his personal representatives ; that the plaintiff's shares of the residue of that estate might be paid to them ; and also, that an account might be taken of Mrs. Esmand's personal estate possessed by her personal representative and that he might be decreed to make good to the plaintiffs what should appear to be due to them on the taking of that account.

To this bill the defendants John Doubleday and Elizabeth his wife (the latter being one of the daughters of William Woolcott) demurred, for multifariousness.

Mr. *Simons*, in support of the demurrer, admitted that if the accounts prayed for by the bill had been confined to the property which Mrs. Esmand took under William Woolcott's will, the bill would not have been multifarious ; but he contended, that as it was not so confined, but went on to pray for an account of Mrs. Esmand's general personal estate, it was multifarious ; and that the defendants, who were interested in William Woolcott's estate only, were not to be kept before the court whilst the accounts of Mrs. Esmand's estate [\*315] were being \*taken, which might be very voluminous, and occupy a great length of time.

Mr. *Roots*, in support of the bill.

The Vice-Chancellor said, that as the plaintiffs' title to their shares of William Woolcott's estate and to Mrs. Esmand's estate were derived under the same instrument, they were entitled to unite the accounts of both estates in the same suit ; and that, therefore the bill was not multifarious.(a)

Demurrer overruled.

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#### JONES v. CROUCHER and others.

1822, 1st February.—*Voluntary settlement.*

Voluntary settlements of personal property, made by persons who are not indebted at the time, are good against a subsequent purchaser for valuable consideration.

OLIVE CROUCHER being entitled to the sum of 1,344*l.* 0*s.* 8*d.* bank annuities, in reversion expectant upon the decease of Betty Croucher, by an indenture dated the 6th of August 1791, directed the trustees in whose names the stock was standing, to stand possessed of it, after Betty Croucher's decease, in trust to pay the dividends to her and her assigns, for her life ; and after her decease, in trust for the defendants, Henry Croucher Butler and James Butler the younger, their executors, administrators and assigns. By an indenture dated

(a) This case is reported in 6 Madd. 94, under the name of "*Turner v. Doubleday*;" but the facts are not stated correctly. [Vide ante, *Kaye v. Moore*, p. 65, and note. Where the case against one defendant is so entire as to be incapable of being prosecuted in several suits, and yet some other defendant may be a necessary party, to some portion only of the case stated, such other party cannot maintain an objection of multifariousness. *Attorney General v. Corporation of Poole*, 4 Myl. & Cr. 31.]

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 1822.—Jones v. Croucher and others.
 

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the 22d of May 1793, Olive Croucher, without taking any notice of the indenture of the 6th of August 1791, assigned her reversionary interest in a moiety of the stock to Thomas Jones, to secure the repayment of 500*l*.

\*In February 1805, Betty Croucher died. Thomas Jones also died, [\*316] having appointed the plaintiff his executor.

The bill, after stating these facts, charged that the indenture of the 6th of August 1791 was voluntary, and made without any good consideration, and that it was fraudulent, and void against the plaintiff; and it prayed that a moiety of the stock might be sold, and the moneys arising from the sale be applied in payment of what was due to the plaintiff under the indenture of the 22d of May, 1793.

The defendant Henry Croucher Butler, by his answer, insisted that the indenture of the 6th of August 1791 was good and valid against the plaintiff even though it were merely voluntary. The defendant James Butler, the younger, did not appear to the bill.

There was no evidence to show that Olive Croucher was indebted to any person at the time when she executed the assignment of the 6th of August 1791, or that Thomas Jones had any notice of that assignment.

Mr. *Horne* and Mr. *Blake*, for the plaintiff, insisted that as the plaintiff was a purchaser for a valuable consideration, and as the assignment of the 6th of August 1791 was merely voluntary, it must be held to be void as against him by 27 Eliz. c. 4.

Mr. *Bell*, and Mr. *Moore*, for the defendant Olive Croucher.

Mr. *Simons*, for the defendant *H. C. Butler*, said that the 27th Eliz. c. 4. did not extend to settlements \*of personal estate, and that [\*317] therefore there was no ground for holding the indenture of the 6th of August 1791 void as against the plaintiff; and he cited *Sloane v. Cadogan*.(a)

Mr. *Wilbraham*, for the trustees.

The Vice-Chancellor said, that settlements of personal estate were not within 27th Eliz. c. 4, and that therefore the plaintiff was not entitled to have the money due to him raised by sale of any part of the capital of the bank annuities; but that, as Olive Croucher had reserved to herself a life interest in the stock, he would be entitled to be paid out of the dividends of the moiety assigned to him, which should become due in her lifetime; and that, as against the defendant, *H. C. Butler*, the bill must be dismissed with costs, [1]

(a) Sugd. Vend. and Purch. 4th edit. 541.

[1] As to voluntary settlements, vide *Southerby v. Arden*, 1 Johns. Ch. Rep. 240; *Sterry v. Arden*, id. 261; *Verplank v. Sterry*, 12 Johns. Rep. 536; *Seward v. Jackson*, 8 Cow. 406.

## CASES IN CHANCERY

BEFORE

### THE VICE-CHANCELLOR.

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[\*319]

\*WAITE v. TEMPLE.

1823, 18th January.—*Parties.*

Where the claim of the next of kin is raised on the record, and one person is, in that character a party, other persons found by the master to be next of kin may be heard by the court, though not parties.

But where the claim is not raised on the record, and none of the next of kin are in that character parties to the cause, there must be a supplemental bill to bring them before the court.

THIS was a bill for the administration of a testator's estate. The testator gave one fifth share of the residue of his estate to Thomas Parby, or his heirs executors and administrators. Thomas Parby died in the life-time of the testator. The executors of Thomas Parby were made parties to this suit; but his next of kin were not made parties.

The case now came on to be heard.

Mr. *Stephenson*, for the executors of Thomas Parby.

Mr. *Heald* objected that the next of kin of Thomas Parby ought to be made parties to this suit; and said, the court would refer it to the master to inquire who were the next of kin, with liberty to file a supplemental bill to bring them before the court.

[\*320] \*Mr. *Hart* said, that after the master's report the next of kin might appear by counsel, and that a supplemental bill was unnecessary.

THE VICE-CHANCELLOR:—It appears to me that the next of kin are entitled to be heard upon a claim as *personæ designatæ*; and the master may inquire who are the next of kin, with liberty to file a supplemental bill to bring them before the court.

It is contended, that after the master's report the next of kin may be heard by counsel without a supplemental bill. If one of the next of kin of Thomas Parby had in that character been made a party to the suit, and the claim of the next of kin had been raised on the record, then any other persons found by the master to be next of kin might have been heard by counsel, though not

1223.—Wigsell v. Smith.

parties; but where no one of the next of kin is in that character a party, nor the claim raised upon the record, there must be a supplemental bill.[1]

## \*WIGSELL v. SMITH.

[\*321]

1823, 18th and 19th February.—*Double Power.—Construction.*

Settlement of two estates in remainder on A. W. T. for life, with remainder to his sons in strict settlement, and remainder over to M. with power to tenants for life in possession to charge the estates with a jointure of 400*l.*; and power to the settlor to revoke the uses of the settlement as to one of the estates, and to appoint new uses. By a subsequent deed the settlor exercises the power of revocation as to the remainder to M; in lieu thereof, appoints that estate to S. and repeats several of the powers contained in the first settlement, and gave power to A. W. T. and S. to charge the estate with 400*l.* by way of jointure. A. W. T., by separate deeds, executes both powers of jointuring.—Held, on a bill by his widow for both jointures, that A. W. T. had no new power to jointure under the second settlement.

THIS was a bill by a widow, praying that she might be declared to be entitled to two several rent-charges of 400*l.* charged, by way of jointure, under two several powers, created by different settlements of the same estate.

Thomas Wigsell was in 1797 entitled to the St. John estate, as tenant for life in possession, under the will of Henry St. John; and Susannah Wigsell was, under the same will, entitled to a moiety of the same estate in remainder as *tenant in tail* expectant on the failure of issue of Thomas Wigsell. Thomas Wigsell was at the same time entitled as tenant for life in possession to the Wigsell estate, with remainder to his first and other sons in tail, with remainder to Susannah Wigsell in tail, with reversion to himself in fee. By a deed, dated the 28th of November 1797, and by a recovery suffered by him and Susannah Wigsell, the estates were settled to the old uses, so far as respected the life estate to Thomas Wigsell, the estate-tail to his first and other sons, and the estate-tail to Susannah Wigsell, with remainder to trustees for a term of 500 years, with remainder to the daughters of Thomas Wigsell, as tenants in common in tail, with cross-remainders with remainder to the use of Attwood Wigsell Taylor for life, with remainder to trustees to preserve contingent remainders, with remainder \*to the first and other sons of Att- [\*322] wood Wigsell Taylor in tail male, with remainder to his daughters, as tenants in common in tail, with cross-remainders; with remainder over to a family of the name of Mercer. This deed reserved a power to Thomas Wigsell and Susannah Wigsell, jointly, or to the survivor of them alone, to revoke the uses thereby limited (except as to the term of 500 years, and the limitation to the daughters of Thomas Wigsell in tail) “and to appoint any new or other use or uses, estate or estates, trusts, powers, provisoes, limitations and

[1] Vide *Manning v. Theisiger*, ante, 106 and note.

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1823.—Wigsell v. Smith.

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conditions, of or concerning the same premises, or any part thereof." It also contained the usual powers of leasing, and sale and exchange; and a condition, that any person becoming entitled to these estates, "under the limitations aforesaid," should within six months afterwards assume the name and arms of Wigsell and also a covenant on the part of Susannah Wigsell, that she would not after the death of Thomas Wigsell exercise her power of revocation and appointment, as to the St. John estate, for any other purpose than that of selling, exchanging, or making partition. And likewise contained a power, authorizing every tenant for life of the estates under the limitations in that deed, to appoint, by deed or will, to the use of any woman with whom he might intermarry, for her life, as her jointure, and in bar of dower, any annual sum not exceeding 400*l.* to be issuing out of and chargeable upon all or any part of those estates, and also to charge the same to the extent of 2,000*l.* with portions for younger children.

The joint power of revocation and new appointment was never executed. In September 1804 Thomas Wigsell died without issue, leaving Susannah Wigsell surviving.

[\*323] \*By deed-poll, dated the 13th of November 1805, and duly executed by Susannah Wigsell pursuant to the power, she revoked the uses, trusts, estates, powers, provisions, conditions, and limitations of the Wigsell estate, subsequent to the limitation to the daughters of Attwood Wigsell Taylor; and in pursuance of the power contained in the deed of 28th November 1797, appointed the Wigsell estate, after failure of issue of the body of Attwood Wigsell Taylor, to the use of R. T. Streatfield, for life, with remainder to his first and other sons in tail, with divers remainders over. This deed-poll also contained a power to Attwood Wigsell Taylor, and R. T. Streatfield, when entitled as tenants for life in possession, "under the limitations aforesaid," to charge the estate with any annual sum not exceeding 400*l.* by way of jointure to any woman with whom he might intermarry, and with any sum not exceeding 3,000*l.* for the portions of younger children.

This power to jointure was in the following words:

"Provided always, and the said Susannah Wigsell doth hereby further limit and appoint that it shall be lawful for each of them the said Attwood Wigsell Taylor, and Richard Thomas Streatfield, when entitled as tenants for life in possession to the said manors, hereditaments, and premises, under the limitations aforesaid, either before or after his intermarriage with any woman or women, from time to time and at any times, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered in the presence of, &c. or by his last will, &c. to grant, limit, or appoint, to or for the use of any woman or women with whom he shall intermarry or take to wife, for the life  
 [\*324] or lives of such woman or women, for her and their jointure and \*jointures, and in bar of her or their dower, any annual sum or sums of money, or yearly rent-charge or rent-charges, not exceeding in the whole the yearly sum of 400*l.* to be tax-free, and without any deduction, and to be issu-

1823.—Wigsell v. Smith.

ing out of, and chargeable upon, all or any part of the said manors, hereditaments, and premises, with such powers and remedies for recovering such annual sum or sums, yearly rent-charge or rent-charges, when in arrears, and such term or terms of years for better securing the due payment thereof, as to the said Attwood Wigsell Taylor, and Richard Thomas Streatfield, shall seem proper; so that there never be more than the said yearly sum of 400*l.* payable out of all or any of the premises, as a jointure or jointures at one time."

In this deed poll the powers of leasing, and the condition to take the names and arms of Wigsell, were repeated in the same form as the power to jointure.

On the 25th of December 1806, Susannah Wigsell died, and Attwood Wigsell Taylor thereupon became entitled to the estates as tenant for life in possession; and he assumed the name and arms of Wigsell, pursuant to the condition. In 1814 he married; and by indenture dated the 1st of November 1816, in execution of the power reserved in the deed of Nov. 1797, and of all other powers enabling him in that behalf, he charged the estates over which the power extended with a jointure of 400*l.* a year to his wife, in bar of dower, to commence on his decease. By another indenture of the 7th November 1816, reciting the settlement of the 28th of November 1797, the deed of revocation and new appointment of the 13th of November 1805, and the power to jointure contained in the last-mentioned deed, and that he was desirous of exercising this \*second power of jointuring in favor of his wife, he, [\*325] in pursuance of the second power, charged the estates over which it extended with a further jointure of 400*l.* a year, in bar of dower, and to commence on his decease. In 1821 he died, leaving issue by his wife; and soon after his death his widow filed this bill against her eldest son and the trustees, praying that it might be declared that she was entitled to both these jointures.

Mr. Preston, and Mr. S. Cullen, for the plaintiff:—The question is; Whether the power to jointure contained in the settlement of Nov. 1797, was revoked by the deed of revocation and new appointment in Nov. 1805. If not revoked, it must be held that the powers in each of these deeds were co-existent, and being co-existent, that they were both duly executed, and that the plaintiff is entitled to the two jointures. It was decided in *Freke v. Lord Barrington*(a) that a power cannot be constructively revoked, but must be expressly named, in order to make the revocation valid. But whether this power was or was not revoked does not much affect the case of the plaintiff; for if there was not a double power to jointure over one of the estates, there must have been one power over each of the two estates. In the deed of November, 1805, which extended only to the Wigsell estate, Attwood Wigsell Taylor is expressly named in the power to jointure, and it is plain that there was an intention on the part of Susannah Wigsell to confer additional benefits on him and the other parties claiming under her appointment. The fact, that

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 1823.—Wigsell v. Smith.
 

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the power to raise portions for younger children, which, in the deed of 1797, extends only to the sum of 2,000*l.* is increased by the deed of 1805 [\*326] to \*3,000*l.* shows an intention to extend the powers. The claim of the plaintiff, though not consistent with the probable intention of the parties, is clearly consistent with the express terms of the deed.

Mr. *Bickersteth*, for the defendants :—It is expressly provided, in the powers of jointuring, in each of the deeds, that no more than one jointure should be payable out of the estate at one time. The sole object of the deed of 1805 was to revoke the uses limited in the deed of 1797, to the family of Mercer, and to substitute new uses in favor of Mr. Streatfield and his family. It must be admitted that the power to jointure in the deed of 1805, extends to Attwood Wigsell Taylor, because he is expressly named in it. But as to him it was unnecessary, as he was then invested with a similar power under the deed of 1797. The question is merely whether the powers are cumulative; because it must be admitted that the power in the deed of 1797 was not revoked. The insertion of the name of Atwood Wigsell Taylor in the power in the deed of 1805, was merely an unnecessary repetition, and conferred no new power.

The VICE-CHANCELLOR :—The argument of the plaintiff supposes, that as to those persons who continued to take under the first settlement, the conditions and powers of the second settlement were meant to be accumulative. The condition to take the arms and name, the power to lease, the powers of sale and exchange by the trustees, could not in their nature be accumulative. No additional force was given to these powers and conditions by the second settlement; and the names of the persons taking under the first settle- [\*327] ment could only be \*there introduced into the second settlement for the purpose of manifesting the intention of the settlor, that these conditions, powers, and provisoes, should equally affect all persons who took by the first or second settlement.

The inference is, therefore, that the names of the persons taking under the first settlement were introduced into the power of jointuring only for the purpose of manifesting the same intention of the settlor. According to the language of this power of jointuring in the second settlement, it is to be exercised by Attwood Wigsell Taylor, when he should be in possession under the second settlement. But he took nothing by the second settlement, and never could be in possession under it; and the inaccuracy of this language strongly manifests that the settlor had only one common intention, as applied to the objects of both settlements.

Declare, therefore, that Attwood Wigsell Taylor had no power of jointuring under the second settlement.

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“ This court doth declare, that the plaintiff Juliana Wigsell is entitled only to the rent charge, or sum of 400*l.* a year secured to her by the indenture in the pleadings mentioned, dated the 1st day of November 1816; and doth order

1823.—Ford v. Rawlins.

that it be referred to Mr. Courtenay, one of the masters of this court, to take an account of what is due to the said plaintiff Juliana Wigsell, in respect of her said rent charge or sum of 400*l.* a year. It is ordered, that what the said master, on taking the said account, shall find due to the said plaintiff Juliana Wigsell, be paid to her by the said defendant Richard \*Smith; [\*328] (the trustee;) and for the better taking the said accounts, &c. And this court doth not think fit to give any costs on either side; and any of the parties are to be at liberty to apply to this court," &c.

Reg. Lib. B. 1822, vol. 604, 6.

FORD v. RAWLINS.

1823, 11th and 21st February; 9th April.—*Will.—Construction.*

Testator bequeathed to his wife the use of his furniture, &c. which he desired to be distributed among his children when the youngest attained 21, at her and his executors' discretion; such part to be reserved for her use as might be thought reasonable, and at her death to be distributed as above directed.—Held that those children who died before the youngest attained 21, did not take vested interests.

THE question in this cause was, whether those children of the testator who died infants took vested interests under the following clause in his will:

"I further leave to the use of my said dear wife, my furniture, plate, jewels, books and pictures, which I desire may be distributed amongst our children on the youngest attaining twenty-one years, at her and my executors' discretion; such part being nevertheless reserved for her use as may be thought convenient; and, at her death to be distributed as above directed."

The testator left a widow and six children; three of whom died infants, and the other three attained the age of twenty-one.

Mr. *Horne*, and Mr. *Combe*, for the children who attained twenty-one:—I. It is decided, that a legacy to a particular class of persons, at a particular time, vests exclusively in those persons who constitute the class at the time fixed by the will. *Godfrey v. Davis.*(a) In the present case \*there was a direction to distribute certain articles among a cer- [\*329] tain class of persons, at a certain time; therefore those who died before that time arrived must be held to take no interest.

II. This is not within that class of cases where the legacy is given to one for life, with remainder to the children; and where it might therefore be considered that the gift to the children was postponed merely for the purpose of giving a life interest to the wife. The wife here takes a qualified interest, determinable when the youngest child attains twenty-one. *Batsford v. Kibble*;(b) *Hughes v. Hughes*;(c) *Crone v. Oddell.*(d)

III. The nature of the property in this case makes no difference.

(a) 6 Ves. 43.

(b) 3 Ves. 363.

(c) 14 Ves. 256.

(d) 1 B. & B. 449.



1823.—Pread v. Hull.

Mr. *Belt*, and Mr. *Munro*, for the representatives of the children, who died before the youngest attained the age of twenty-one.

The testator clearly intended to postpone, not the period of vesting, but merely the period of the enjoyment of the property, thinking it the most beneficial arrangement for them, and fixing that period, until the arrival of which it was probable the children would continue to reside with their mother. He could not have any intention of deferring the vesting of the gift to the children with any view to their age. *Batsford v. Kebble*, *Hughes v. Hughes*, and the other cases cited on the other side, are cases in which the gift was in such express words as prevented the vesting till the period fixed for that purpose.

It has been decided that a legacy to a class of children, though payable [\*330] at a future period, does not postpone the vesting till that period.

*Devisme v. Mello*, (e) *Ellison v. Airey*, (f) *Hanson v. Graham*. (g)

Mr. *Hayter*, for the executors.

The VICE-CHANCELLOR:—There is here no direct gift to the children, but a power to the widow and executors to distribute amongst the children, at their discretion, certain specific articles when the youngest attains twenty-one. Of necessity, this means when the youngest who lives to twenty-one attains that age; and the discretion which is given to the widow and executors must be meant to be applied to the circumstances of the children at the period of division, and can have no relation to the children who died in their infancy.

It makes no difference that the widow is to have the interim use of this property, or the use of a part of it for her life, after the youngest child does attain twenty-one, if she happens to be then living. Declare that the three children who died under twenty-one did not take vested interests. [1]

[\*331]

\*PREAD V. HULL.

1823, 12th and 19th February.—Practice.—Decree.

Defendant submitting to the same decree as the plaintiff, according to the case made by the bill, would be entitled to at the hearing, may at any time stay all further proceedings in the cause.

The stat. 7 Geo. 2, c. 20, as to foreclosure, gives no new power to courts of equity.

The stat. 7 Geo. 2, c. 20, gives no new jurisdiction to courts of equity.

In this case the bill was filed by mortgagees against the mortgagor, and also against a subsequent mortgagee; and it prayed that the mortgaged estate might be sold to satisfy the claim of the plaintiffs. The subsequent mortgage contained a power to sell the estate.

The court was now moved on behalf of the defendant, the mortgagor, for a reference to the master, to take an account of what was due to the plaintiff,

(e) 1 Bro. C. C. 568.

(f) 1 Ves. sen. 111.

(g) 6 Ves. 239.

[1] For American cases, as to when a legacy vests, vide Amer. Ch. Digest, Legacy V.

1823—Irvine v. Young.

and the subsequent mortgagee, for principal and interest, and costs, and that upon payment within six months after the report they might re-convey; and that all proceedings might be stayed in the mean time.

Mr. *Wakefield*, in support of the motion, insisted that the mortgagor was entitled to such an order in this case as in the common case of foreclosure.

Mr. *Horne*, for the plaintiff, refused to consent to the motion, and insisted that such an order could not be made without his consent.

The VICE-CHANCELLOR:—The act 7 Geo. 2, c. 20, gives authority to courts of equity, in a suit for foreclosure, to stay the proceedings in any stage of the cause, upon the defendant submitting to the same decree, as the plaintiff would, according to the case made by the bill, be entitled to at the hearing of the cause. It has frequently been stated by judges of the highest authority that courts of equity did not require the aid of the legislature in that [\*332] respect, and that the real purpose of the statute was to give a new jurisdiction in the case of mortgages to courts of law, and that the section as to courts of equity, was merely incidental and unnecessary. The present bill being for sale, and not for foreclosure of the mortgaged estate, is not within the statute; but I fully adopt the opinion of the former judges, to whom I refer, and consider that courts of equity have inherent jurisdiction to stay the proceedings in any cause, and in any stage of the cause, whenever the defendant will at once submit to a decree establishing the full demand made by the bill, and the whole relief prayed in respect of that demand, with costs.

The present motion is, however, misconceived. It submits, indeed, to the whole demand made by the plaintiffs, but not to the whole relief prayed by the bill. In the first place, it requires that all proceedings on the part of the plaintiffs should be stayed until the accounts of the defendants are taken, with which the plaintiffs have no concern; and then it provides no remedy if the mortgagor should happen not to pay the money reported due at the end of the six months; and the plaintiffs may then have to re-commence their proceedings. The plaintiffs are not to be prejudiced by such an interlocutory order. If the defendant, the mortgagor, and his co-defendants, the subsequent mortgagees, will now submit to the same decree as the plaintiffs, according to the case made by the bill and the decree prayed, would be entitled to at the hearing, with costs, I am fully prepared to make such an order, and I can now make no other order.

\*IRVINE v. YOUNG.

[\*333]

1823, 25th February.—*Account.*

The mere fact of the delivery of an account, without evidence of acquiescence, does not afford sufficient legal presumption of settlement.

THIS was a bill by the assignees of a bankrupt against his co-partner in an

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 1823.—*Levy v. Ward.*


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adventure account. The bill stated that three years before the bankruptcy the defendant had delivered an account to the bankrupt; but the bill treated the whole matter as still unsettled.

The defendant, by his answer, stated, that the account referred to by the bill had never been objected to before the bankruptcy; and he insisted that it was therefore to be taken as a settled account. But he gave no evidence as to what followed the delivery of the account; nor did it in any manner appear in the cause, other than by the allegations in the answer.

Mr. *Hart*, and Mr. *Matthews*, for the plaintiff.

Mr. *Bell*, and Mr. *Collinson*, for the defendant, insisted, that as the plaintiff had not disproved the allegation in the answer, the court must consider the account as settled.

The VICE-CHANCELLOR :—It was as incumbent upon the defendant to support his answer by evidence, as it would have been to support by evidence a plea of a settled account. The naked fact of delivery, without evidence of contemporaneous or subsequent conduct, affords no sufficient legal presumption that the account was settled.[1]

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 [\*334]

\*LEVI D. WARD.

1823, 28th February.—*Practice.*

The principle of waiver applies to an irregular, but not to an erroneous, order.

THE bill was filed on the 16th of January 1823. On the 17th of January the plaintiff obtained, upon an affidavit, stated to be an affidavit of merits, the order, that service of the subpœna upon the attorney at law should be good service, the defendant being abroad.

The subpœna was served on the 22d of January; on the 27th the attorney entered an appearance for the defendant. On the 9th of February the plaintiff sued out an attachment for want of an answer; and on the 10th of February obtained the common injunction to stay proceedings at law.

On the 15th of February notice was given of a motion, on the part of the defendant, to discharge the order for the service of the subpœna on the attorney at law, and all subsequent proceedings, on the ground that there was no sufficient affidavit of merits to justify that order.

The insufficiency of the affidavit was not denied; but Mr. Parker, for the plaintiffs, insisted, that the defendant came too late, inasmuch as the insufficiency of the affidavit was apparent on the order when the subpœna was served on the 22d of January; and that by his appearance and subsequent delay he had led the plaintiff to the expenses of the attachment and the injunction. *Downes v. Witherington*, (a) *Fletcher v. Wells*. (b)

(a) 2 Taunt. 242.

(b) 6 Taunt. 91.

[1] Keeping an account for a great length of time, without objection to it, affords evidence of acquiescence. *Fresland v. Heron*, 7 Cranch, 147. *Philips and others v. Belden and others*, 2 Edw. 1.

1823.—*Sidden v. Forster.*

\**Mr. Heald*, for the defendant.

[\*335]

The VICE-CHANCELLOR :—If this had been a question of irregularity, I should have been of opinion that the defendant, by his subsequent conduct, had waived the irregularity ; but it is, strictly, not an irregular but an erroneous order, and the principle of waver cannot save it.

Order made without costs.

SIDDEN v. FORSTER.

1823, 10th March.—*Practice.*

If after a defendant has put in his examination to the usual interrogatories before the master, the plaintiff discovers that the defendant has received sums not mentioned in his examination, the master is at liberty to receive a new state of facts, and further interrogatories founded upon them, without the order of the court.

THE defendant had put in his examination to the usual interrogatories in the master's office, as to the sums received by him on account of certain real estates, of which he was a trustee. Afterwards the plaintiff discovered that the defendant had received various sums which were not mentioned in the examination : upon which he carried in a special state of facts as to the matters so discovered, and exhibited fresh interrogatories for the examination of the defendant relative thereto ; but the master refused to receive these interrogatories, conceiving he had no authority so to do without an order of the court to that effect.

*Mr. Bell*, for the plaintiff, now moved, that the master might be ordered to receive the new interrogatories. He said it was the practice of the masters to receive interrogatories from time to time ; and that, \*after [\*336] a defendant had been examined upon the usual interrogatories, the plaintiff was at liberty to carry in a special state of facts, and to exhibit interrogatories for the examination of the defendant as to its contents.

*Mr. Wyatt*, contra :—If interrogatories are allowed to be exhibited from time to time the defendant will be put to great trouble and expense. There must be some limit to the indulgence thus given to the plaintiff.

The Vice-Chancellor considered that the order of the court was not necessary to enable the master to receive these interrogatories ; and that he had full authority, under the general direction in the decree, to examine a party from time to time, as the justice of the case should require.

\**HOPKINS v. TOWLE.*

[\*337]

1823, 11th March, and 17th April.—*Will.—Construction.*

Testatrix bequeathed one moiety of the residue of her personal estate to her daughter Hannah, for her separate use, during the joint lives of her and her husband ; and, if she survived, to her absolutely ; if not, to her children who should attain twenty-one ; and she bequeathed the other moiety

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for the benefit of her daughter Mary and her children ; with a bequest over, if she died without children, to Hannah and her children, in like manner as the first moiety. By a codicil, she bequeathed the whole residue, if both her daughters died without leaving a child who should attain twenty-one, to A. Both the daughters died without issue, but Hannah survived her husband : held, nevertheless, that A. was entitled to the residue.

HANNAH LAMBE by her will devised to J. Fullagar and Thomas Towle, and their heirs, a freehold messuage at Walthamstow in Essex, upon trust to pay the rents and profits to her daughter Hannah Killingsley, the wife of Robert H. Killingsley, during the joint lives of her and her husband, for her separate use ; but in case she should survive her husband, then in trust to permit her to receive the rents and profits for her natural life ; and, after her decease, the testatrix gave the messuage unto the children which her daughter should have living at the time of her decease, equally to be divided between them, share and share alike, as tenants in common, and to the several and respective heirs of their bodies ; and in default of all such issue, then she gave the same unto her daughter Mary Cooper, the wife of R. H. Cooper, and to the heirs of her body ; and, in default of all such issue, then she gave the same to her own right heirs : also she gave to her daughter, Mary Cooper, 1,000*l.* to be paid to her within three months next after the testatrix's decease, to make her equal with H. Killingsley for the house at Walthamstow ; and she gave to R. H. Cooper 500*l.* ; also she gave to Mary Cooper her freehold messuage at Brentwood, to hold the same to her and the heirs of her body ; and in default of such issue she gave the same to Fullagar and Towle, and their heirs, upon trust to receive the rents and profits thereof, and to pay the same to Hannah Killingsley, during the joint [\*338] lives of her and her husband, \*for her separate use ; but in case H.

Killingsley should survive her husband, then in trust to permit her to receive the rents and profits for her natural life, and, after her decease, she gave the last-mentioned messuage unto the children which H. Killingsley should have living at her decease, equally to be divided between them as tenants in common, and to the several and respective heirs of their bodies ; and, in default of such issue, the testatrix gave the same to her own right heirs. And she gave to her said two daughters all her plate, household goods, china, linen, wearing apparel and furniture to be equally divided between them. And she gave to Fullagar and Towle thirty guineas a-piece for their trouble, and also 50*l.* to be distributed by them amongst poor dissenting ministers' widows. All the rest, residue, and remainder of her estate whatsoever and wheresoever, subject to the payment of all just debts, legacies and funeral expenses, she gave to Fullagar and Towle, their executors and administrators, upon trust, to place out or continue the same at interest, upon government or real securities, and to pay the dividends, interest and produce of one moiety thereof, to Hannah Killingsley, during the joint lives of her and her husband, for her separate use ; and in case she should survive her husband, then upon trust, to stand possessed of one moiety of the residue for the use and benefit of

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her daughter Hannah ; but in case she should not happen to survive her husband, then, immediately after her decease, in trust, to pay that moiety unto her children, and to such one or more of them as she should by her will appoint ; and in default of such appointment unto all her children living at her decease, equally to be divided between them, and to be paid to them as they severally attained the age of twenty-one years : provided, that if Hannah \*should not have any child living at her decease, or having a child or [\*339] children then living, such child, or all such children should die under the age of twenty-one years, then in trust, to stand possessed of that moiety to and for the use and benefit of her other daughter Mary Cooper, and her child or children, in the same manner as was thereafter directed touching the other moiety of her estate. And as to the other moiety of her estate so to be placed out and continued at interest, upon trust, that Fullagar and Towle should pay the interest, dividends and produce thereof, to Mary Cooper, during the joint lives of her and her husband, for her separate use ; and, after her decease, then in trust to pay and apply the last-mentioned moiety unto her child or children, or to such one or more of them as she should by will appoint, and in default of appointment, unto and amongst all her children, living at her decease, in the same manner as was thereinbefore declared concerning the first moiety ; provided, that if Mary Cooper should not have any child living at her decease, or having a child or children then living, such child, or all such children, should die under the age of twenty-one years, then in trust, to stand possessed of the last-mentioned moiety for the use and benefit of Hannah Killingsley, and her child and children, in the same manner as was thereinbefore directed touching the first-mentioned moiety of the residue of her estate ; provided, that in case H. Killingsley should die in the life-time of her husband, and should not have any child living at her death, or leaving a child or children, then living, such child, or all such children, should die under the age of twenty-one years, then in trust, to stand possessed of the second-mentioned moiety, for the executors or administrators of Hannah Killingsley ; provided, that in case Mary \*Cooper should not have any child living at her death, [\*340] or having a child or children then living, such child, or all such children, should die under the age of twenty-one years, then she directed Fullagar and Towle to stand possessed of the moiety of the residue of her estate so as aforesaid given over to Mary Cooper and her children, upon the event of her sister dying in the life-time of her husband, and leaving no child, or of her child or children dying under twenty-one, in trust for the executors or administrators of Mary Cooper. And she appointed Fullagar and Towle executors of her will.

The testatrix, by a codicil, revoked the devise in her will of the message at Walthamstow after the decease of her daughter Hannah Killingsley without issue, unto her daughter Mary Cooper, and the heirs of her body ; and she also revoked the devise thereof to her own right heirs ; and she thereby gave, after the decease of Hannah Killingsley without issue, that message to

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the trustees, upon trust, to pay the rents and profits thereof to Mary Cooper for her separate use, during the joint lives of herself and her husband; but in case she should survive her husband, then in trust, to permit her to receive the rents and profits thereof for her life. And after her decease the testatrix gave that messuage to her children living at her decease, as tenants in common in tail, with remainder to all the children of her two late brothers, S. Steare, and William Steare, who should be then living, as tenants in common in fee. And the testatrix also revoked the bequests of 1,000*l.* to Mary Cooper, and of 500*l.* to R. H. Cooper; and, in lieu thereof, she gave to the trustees 1,500*l.* upon trust, within three months after her decease, to place it out at interest in [\*341] the funds, \*and to pay the dividends thereof to Mary Cooper during the joint lives of her and her husband, in such and the like manner as one moiety or half part of her estate was by her will directed to be placed out at interest for the separate use of Mary Cooper and her children, in such manner as was in her will for that purpose mentioned. And in case Mary Cooper should not have any child or children living at her decease, or having a child or children then living, they should all die under the age of twenty-one years, then she directed the trustees to stand possessed of the 1,500*l.* in trust for Hannah Killingsley, and her child and children, in the same manner as in her will was directed touching the first mentioned moiety of the residue of her estate therein given and bequeathed to the trustees for the separate use of Hannah Killingsley, and her children: but in case both her daughters should die without leaving any child or children living at the time of their respective deaths, or having such they should all die under the age of twenty-one years, then she directed the trustees to stand possessed of the 1,500*l.* together with all the residue of her personal estate by her will given to them in trust for the separate use of her two daughters and their children, as therein mentioned, in trust for all the children of her two brothers, S. Steare, and William Steare, as should be then living, equally to be divided between them, share and share alike. And the testatrix also revoked the devise of the messuage at Brentwood to Mary Cooper, and to the heirs of her body. And in default of such issue of Hannah Killingsley, she likewise revoked the devise thereof to her own right heirs; and she thereby gave that messuage to the trustees, upon trust, to pay the rents and profits thereof to Mary Cooper, for her [\*342] separate use, during the joint lives of her and her husband. \*But in case she survived her husband, then in trust, to permit her to receive the rents and profits thereof for her life; and after her decease, she gave that messuage to the children of Mary Cooper living at her decease, as tenants in common in tail, with remainder to the trustees in fee, in trust, for the proper use of Hannah Killingsley, and her issue, in the like manner as the same was given to her and them by the will. And in default of such issue, then she gave the same unto the children of her brothers, S. Steare, and William Steare, as should be then living, as tenants in common in fee.

Mrs. Cooper died without issue, in Mrs. Killingsley's life-time; the latter sur-

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vived her husband, and also died without issue. The plaintiffs were the only children of S. Steare, and William Steare.

They insisted, by their bill, that, in the events that had happened, the funds in which the testatrix's residuary estate was invested had come to, and did then of right belong to, the plaintiffs; and they prayed, that it might be declared that they were entitled, upon the true construction of the will and codicil, to those funds in equal moieties; and that the trustees might be decreed to transfer the same accordingly, and to account for and pay to the plaintiffs the dividends arisen thereon since Mrs. Killingsley's death.

The defendants, who were legatees of certain parts of the funds under Mrs. Killingsley's will, by their answer, submitted to the court whether, according to the true construction of Mrs. Lambe's will and codicil, Mrs. Killingsley having survived her husband, and Mrs. Cooper having died without issue, Mrs. Killingsley \*did not become absolutely entitled to the funds; [\*343] and whether the same, together with all the dividends accrued thereon since Mrs. Killingsley's death, ought not to be transferred and applied pursuant to her will.

Mr. *Sudgen*, and Mr. *Pepys*, for the plaintiffs:—

By the will, one moiety of the residue is given to Hannah Killingsley absolutely, in case she survives her husband; and the question is, whether the codicil cuts down that absolute bequest, and gives to the plaintiffs the whole residue, in the event of the testatrix's two daughters dying without having any child who should attain the age of twenty-one years, whether Hannah did or did not survive her husband? The will is not accurate; because it gives one moiety to Mrs. Cooper during the joint lives of her and her husband only, and then gives it over on Mrs. Cooper's decease. The words of the codicil upon which this question arises are, "but in case both my said daughters shall happen to die without having any child or children living at the time of their respective deaths, or having such, they shall all happen to die under the age of twenty-one years, then I do hereby order and direct," &c. Now, though there is no express revocation of the gift of a moiety to each daughter absolutely, yet the effect of this clause is to revoke those bequests. *Doran v. Ross*.(a)

Mr. *Bell*, and Mr. *Horne*, for the defendants:—

The construction of the codicil is very easy, if we get at the true construction of the will. The proviso which follows the bequest of the first moiety of the residue appears, *prima facie*, to relate to the whole of that bequest. \*But, upon further consideration, it will be found to relate [\*344] only to the event of Mrs. Killingsley surviving her husband. The testatrix, throughout the whole of this will, contemplates two events, one of which is Hannah's dying in the life-time of her husband, and the other of her surviving him; and if she survives, she always contemplates her taking abso-

(a) 1 Ves. 57.



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lutely. When the testatrix, in her codicil, directs, that, in case Mrs. Cooper should die without leaving any child who should attain twenty-one, her trustees should stand possessed of the 1,500*l.* in trust for Mrs. Killingsley and her children, in the same manner as in her will was directed touching the first-mentioned moiety of the residue of her estate; it is exactly the same as if she had repeated the words; and therefore as if she had said: "If Mary dies without issue, I give the 1,500*l.* to the separate use of Hannah; and if she dies in the life-time of her husband, then to her children, as she shall appoint; and if she survive her husband, then to her absolutely." Then comes the clause upon which the difficulty arises. Now in that clause there is no revocation of what the testatrix had before given to Hannah, which clearly shows that she was not contemplating a general failure of issue, but that failure of issue upon which she gave over the property she had bequeathed to Hannah; that is, her dying without issue in the life-time of her husband.

The VICE CHANCELLOR:—The words of the codicil, taken literally, do, in the event which has happened, of both daughters having died without children, make a complete disposition of the 1,500*l.* legacy, and of the whole residuary estate in favor of the plaintiffs.

[\*345] \*It is, however, insisted, on the part of the defendants, that as Hannah Killingsley survived her husband, and would, therefore, if there had been no codicil, have taken the whole residuary estate absolutely, whether she had children or not, the codicil is not to be understood as referring to that event but as referring only to the event in which the will had made a disposition over of the whole residuary estate, in the event of there being no child of either daughter, namely, in the case of Hannah dying in the life-time of her husband; and that all which the codicil intended was a substitution for that gift.

I have entertained great doubt upon this point; but, upon the whole, I think I should disappoint the intention of this testatrix, if I were so to qualify the general sense of the expressions which she has used. There are parts of the codicil which were not observed upon at the bar, which appear to me to afford evidence of the general intentions of this testatrix.

The testatrix was seised of a freehold property at Walthamstow, and of another freehold property at Brentwood; and both are so devised by the will, that in the event of Hannah Killingsley having no children, Mary Cooper would take the absolute interest in tail, with a remainder to the two daughters in fee. The testatrix also, by her will gives 1,000*l.* absolutely to Mary Cooper and 500*l.* absolutely to her husband. All the rest of the testatrix's property, with the exception of very trifling legacies, passes by the residuary gift to the two daughters and their children. The will takes no notice of the children of the testatrix's two brothers, the Steares. By the codicil, the devises of the two freehold properties at Walthamstow, and at

[\*346] Brentwood, \*are revoked, and new devises are made, providing for

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the daughters and their children; but, on failure of their children, limiting these properties to the family of the Steares. The absolute gift of the 1,000*l.* to Mary Cooper, and of 500*l.* to her husband, are in like manner revoked; and the clause of the codicil upon which the question arises limits a life interest in these two sums to Mary Cooper, with remainder to her children, with remainder to her sister Hannah Killingsley and her children, with remainder over, in case of the failure of the children of both daughters, to the family of the Steares, by the expressions which create the doubt. These expressions refer to, and, in the event of the failure of the children of the daughters, comprise also, the whole residuary estate.

The purpose of the codicil therefore seems to be, in case of the failure of the daughters and their children, to take away the absolute interests which, by the will, would have vested in the daughters, and to substitute the Steares as the general objects of her bounty. And if I were to venture to qualify the literal force of the expressions in the codicil, so as to prevent their having that effect as applied to the 1,500*l.* and the residuary estate, I fear that I should not advance, but disappoint, the intention of the testatrix.

Declare that, according to the true construction of the will and codicil of Hannah Lambe, the testatrix in the pleadings named, the plaintiffs are entitled, in equal moieties, to the sums of bank annuities in the pleadings mentioned to be standing in the names of the trustees of her will.[1]

\*PRICE v. COPNER.

[\*347]

1823, 25th March, and 17th April.—*Equity of Redemption.*

Where the purchaser of an equity of redemption had the legal estate conveyed to him by a deed, dated the 24th of August, 1796, in which it was recited, that the purchaser had some time since paid to the mortgagee the money due on his mortgage, and a bill to redeem was filed on the 29th of January, 1816: held, that the recital was an acknowledgment of the mortgage title, within 20 years from the filing of the bill.

Husband and wife being jointly entitled to an equity of redemption in fee, convey it by deed, without a fine, to the mortgagee. The wife survives; she or her heir may redeem at any time within twenty years from the husband's death.

THE bill was filed for the redemption of lands in Herefordshire, which had been mortgaged by the plaintiff's ancestors. The question in the cause was; "Whether the equity of redemption was barred by length of time."

In 1761, Martin Hall, being seised in fee of the estate in question, mortgaged it to William Hall, for a term of one thousand years, to secure 50*l.* and interest. In 1766, one Powell paid off the 50*l.* and took an assignment of the mortgage.

By indentures of lease and release, dated the 19th and 20th of January,

[1] Affirmed, 3 Russell, 304.

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1768, and made between Martin Hall, of the first part ; William Price, and Elizabeth his wife, of the second part ; Henry Cotmore of the third part ; and Walter Ingram, of the fourth part : Martin Hall, in consideration of his natural love and affection for Elizabeth Price, his daughter, and for the purposes after mentioned, conveyed the lands to Cotmore and Ingram, to hold to Cotmore for sixty years ; and after the expiration of that term, to the use of Ingram in fee, in trust for Price and his wife, and their heirs, subject to the payment of the money due to Powell. The trusts of the term of sixty years were to permit Martin Hall to take the rents for so many years of that term as he should live, and then to stand possessed of it for Price and his wife, their heirs [\*348] and assigns, and to \*attend the inheritance. Martin Hall covenanted that the lands were free from incumbrances, except the mortgage.

By indentures of lease and release, dated the 31st January, and 1st of February, 1768, the release being made between Price and his wife of the first part ; Ingram of the second part ; Coningsby Brace of the third part ; and one Bernard of the fourth part ; and by a fine levied by Price and his wife, hey, in consideration of 30*l.* to them paid by Brace, conveyed the lands to Brace in fee, subject to a proviso, that Brace and his heirs should, on re-payment of that sum, with interest, on the 1st of February, 1769, re-convey the lands to Price and his wife, their heirs and assigns, or to such person or persons, uses or purposes, as they should appoint, or should stand seised thereof, for the use of Price and his wife, their heirs and assigns.

By an indenture, dated the 18th of October, 1768, made between Hall of the first part ; Cotmore of the second part ; Brace of the third part ; Price and his wife of the fourth part ; and John Hughes of the fifth part, Cotmore, by Hall's direction, assigned the lands to Hughes for the remainder of the term of sixty years ; and Brace, on being paid his principal and interest, conveyed to Hughes in fee, subject to a proviso, that on payment of 21*l.* by Hall or Cotmore, or their representatives, to Hughes, or his executors, on the 16th of October then next, the latter should re-assign the term of sixty years, or stand possessed thereof upon the trusts of the indenture of the 20th of January, 1768, and that if Price, or his heirs, should pay to Hughes, on the same day, the money paid to Brace, then Hughes should stand seised of the lands [\*349] to the use of Price and \*his wife after Hall's decease, and for the other purposes expressed in the indenture of the 20th of January, 1768.

By an indenture, dated the 17th of October 1768, and made between Powell of the first part ; Hall, and Price and his wife, of the second part ; and Hughes of the third part ; Powell and Hall, in consideration of the money due to the former being paid to him by Hughes, assigned the lands to Hughes for the remainder of the term of one thousand years, subject to redemption, on payment by Hall, his heirs, executors, and administrators, to Hughes, or his executors, of the principal and interest on the 16th of October then next.

By an indenture, dated the 3d March 1769, and made between Hall, and Price and his wife, of the one part, and Hughes of the other part, in considera-

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tion of the sums then due to Hughes from Hall and Price, and of a further sum then advanced by Hughes to Price and his wife, making in all 162*l.* Hall, and Price and his wife, released, assigned, and confirmed the lands to Hughes, his heirs, executors, administrators, and assigns, not only for the term of one thousand years, but, after the expiration of it, for ever; subject to a proviso for redemption on payment by Hall and Price, or either of them, or their heirs, to Hughes, his executors, &c. of the 162*l.* and interest, on the 2d March then following; and that after such payment, Hughes and his heirs should stand seised of the lands in trust for Hall, for so many years of the term as he should live; and after his decease, in trust for Price and his wife, and their heirs, and, at their request, to re-convey the lands, according to the uses and trusts of the indenture of the 20th of January 1768.

\*By indentures of lease and release, dated the 5th and 6th of April [\*350] 1774, the release being made by Hall, and Price and his wife, of the one part, and James Stephens of the other part, in consideration of 15*l.* paid by Stephens to Hall and Price; they, together with Elizabeth Price, conveyed their equity of redemption to Stephens in fee. These indentures were executed by Price and his wife only.

James Stephens afterwards died, having devised all his real estates to Henry Stephens in fee, and appointed him his executor.

By indentures of lease and release, dated the 23d and 24th of August 1796, the release made between Hughes, of the first part, Henry Stephens of the second part, and Thomas Copner of the third part, after reciting the indenture of the 2d March 1769, and that Henry Stephens had some time since paid Hughes the principal and interest due on his mortgage, Hughes, by the direction of Henry Stephens; and Henry Stephens, in consideration of 305*l.* paid to him by Copner, conveyed the lands to Copner in fee.

William Price died in April 1797, and Elizabeth Price in May 1803, leaving the plaintiff her heir at law. Thomas Copner died in 1812, leaving the defendant, Priscilla Copner, his widow and administratrix, and the other defendant, Thomas Copner, his heir at law. Hughes had never been in possession of the estate. But Price remained in possession until some time in August 1796, when Thomas Copner forcibly ejected him.

The bill was filed on the 29th January 1816. By the decree made on the hearing of the cause, it was \*referred to the master to inquire [\*351] whether the defendants, or those under whom they claimed, had treated the premises in question as a mortgage title, or in any manner acknowledged them to have been held as a mortgage title at any time within twenty years before the filing of the bill. The master having reported in the affirmative, the defendants took exceptions to his report, and the cause now came on to be heard upon those exceptions, and for further directions.

Mr. Bell, and Mr. Rouspell, for the plaintiff:—We contend that the assignment by Hughes to Copner was an acknowledgment of the mortgage title;

1823.—Price v. Copner.

and if not, that the right of redemption is not barred ; because during Price's life the estate was irredeemable. By the conveyance of April 1774, James Stephens got an estate during the life of William Price completely absolute. For though Price could not deprive his wife of her reversion, yet he could pass the interest during his own life. The consequence was that his wife never could have a right of entry until her husband's death.

This is not the case of a married woman being divested of her right to an estate, and who has only ten years after the death of her husband to assert her right. But here Copner got a perfect estate during the life of Price, and would have had the power of disposing of it if Price had survived his wife. When this bill was filed it would have been competent for the plaintiff, if there had been no outstanding term, to assert his right by bringing an ejectment. Suppose Henry Stephens, or Copner who represents him, had entered into possession of the premises in 1796, then Mrs. Price would have [\*352] \*had a right, upon her husband's death, to bring a bill to redeem Hughes' mortgage. Supposing that Price and his wife did convey the fee simple to Stephens in 1774 ; if no mortgage had been then existing Mrs. Price would have had twenty years after the death of her husband in 1797 to bring an ejectment. For her husband had given a good title during his life ; and if it had not been for Hughes' mortgage it would have been competent for her son, in 1816, to have brought an ejectment. It never can be held, that, if the tenant for life of a mortgaged estate lives for twenty years after the mortgage has been in possession, the remainder-man will be barred of his right to redeem. As soon as a person who has got a legal title gets in a mortgage he is considered as receiving the rents in discharge of the mortgage. If Hughes had taken a conveyance from Price he would have had a right to hold the estate, and might have set Mrs. Price at defiance during Price's life. She could not have compelled him to part with the legal estate until her husband's death. In this case a life interest was obtained from one person, and a mortgage upon the same estate from another, during the coverture : was not, then, Mrs. Price entitled to redeem when her coverture determined ? If a tenant for life takes in a mortgage, can he, when his qualified interest ceases, say that he is entitled absolutely to the estate ?

Mr. *Sudgen*, and Mr. *Knight*, for the defendants :—

I. That which is relied upon by the plaintiff as an acknowledgment of the mortgage title is not such an acknowledgment as a court of equity requires. To say that the getting in of the legal estate is an acknow- [\*353] ledgment of the mortgage title, is to violate the usual \*sense of words.

It does not appear that the money due on the mortgage was paid off within the twenty years ; for the recitals of the deed of 1796 state that Henry Stephens had some time since paid off the principal and interest due to Hughes. If the mortgage money was paid off a very few months only before the date of that deed, we should stand on a title where the mortgage money was paid off more than twenty years before the filing of the bill.

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II. Here the parties who seek to redeem claim adversely the equity of redemption; and the mere acknowledgment of a mortgage is not sufficient to give a right of redemption where the persons who claim subject to the mortgage title claim adversely the equity of redemption.

III. Mrs. Price says, that because she and her husband were jointly seised of this estate, twenty years must elapse after her husband's decease, before she is barred of her right to redeem. From what was said in *Blake v. Forster*, (a) and in the second branch of the case of the *Marquis of Cholmondeley v. Earl of Clinton*, (b) there can be no equity of redemption after twenty years, let the estate be settled as it may. It is impossible to treat Mr. Price as tenant for life, or Mrs. Price as entitled to an estate of inheritance in remainder; for the equity of redemption was settled on them in entirety. It cannot be represented as constituted of different estates: it is one entire fee simple; and therefore the right to redeem must be entire. Mrs. Price and her husband had the right; then why should she not exercise it? She [\*354] might have filed a bill to redeem. *Harrison v. Hollins*. (c)

IV. Supposing, however, that a right to redeem did exist in Mrs. Price at her husband's decease, by what rule is she entitled to have twenty years allowed her after her husband's death to assert that right? It is impossible that she can have more than ten years: for the right to redeem Hughes was first in her husband; and therefore her right could never give her more than ten years from the death of her husband. *Belsh v. Harvey*. (d)

If the right to redeem is considered as arising out of the nature of the estate, we contend that the husband and wife had one entire joint estate, and but one right of redemption. But if the court should be of opinion that the wife's right did not accrue to her until her husband's death, and that she is to have twenty years to assert it after that event, then we submit that there has been no acknowledgment of the mortgage title within that period; and that, at all events, it must be sent to the master to inquire when the money was really paid to Hughes.

The VICE-CHANCELLOR:—The possession of Stephens was not a possession under the mortgage. Stephens was never the mortgagee. He professed to be the purchaser of the equity of redemption, subject to the mortgage, and was, in fact, by the effects of the conveyance of 1774, the [\*355] owner of that equity of redemption during the life of Price, the father of the plaintiff, and would, by the effect of it, have been the absolute owner of that equity of redemption, if Price, the father, had survived the wife. Price, the father, could make no conveyance of the joint fee which could bind his wife; and there being no fine levied by the plaintiff's mother to confirm the

(a) In the House of Lords, *sem.* 1823, not yet reported.

(b) 2 J. & W. 1.

(c) Rolls, 24th February 1812; cited from a MS. note, in the possession of Mr. Shadwell.

(d) 3 P. W. 287, in note; and Sug. Vend. & Pur. appendix, 35.

1823.—*Lyon v Mercer.*

conveyance of 1774, her execution of that conveyance by signature was a mere nullity; and, upon the death of Price, the father, in 1797, the equity of redemption in the joint fee survived to her. By the conveyance of 1796, Copner became entitled both to the mortgage, and to the equity of redemption, as far as Price, the father, could transfer it. And if Copner's possession from August 1796 be to be referred to his mortgage title (which may be doubtful) still it is a possession within twenty years before the bill was filed, and does not exclude redemption by the plaintiff.

The exceptions to the master's report must be over-ruled. [1]

[1356]

## \*LYON v. MERCER.

1823, 12th April.

After a decree in a suit, in which a lunatic and his committee were defendants, the committee died, and a new one was appointed. Ordered, upon motion, that the new committee should be named, as such, in all future proceedings in the cause.

THE defendants in this cause were Tarbuck, a lunatic, and Mercer, the committee of his person and estate. After the decree had been made, Mercer died; upon which an order was made in Tarbuck's lunacy, appointing Pilkington to be the committee of Tarbuck's person and estate in Mercer's place.

Mr. *Cooper*, for the plaintiff, now moved, that Pilkington's name might be substituted, as a defendant, in Mercer's place; and cited *Johnson v. Legard*, (a) adding, that that case had been searched for in the registrar's book, and that the entry of it was found to be, in substance, as follows:—Defendant, T. Legard, put in his answer; afterwards a commission of lunacy issued against him, under which he was found a lunatic. The plaintiff filed a supplemental bill against the defendant (the lunatic) and against his committee; they put in their answers; the cause was heard, and a decree made. By an order made in the lunacy, the committee was discharged, and a new one appointed. Under these circumstances an application was made on the 2d of March 1816 to substitute the new committee in the room of the former one; which, upon hearing Mr. *Wear*, of counsel for the new committee, and also for the old one, and an affidavit of notice of motion to the other defendants, was ordered accordingly. (b)

THE VICE-CHANCELLOR:—I will follow that case. My order will be, that Mr. Pilkington be named as the committee in all the future proceedings in the cause. [2]

(a) 2 Mad. Princ. & Pract. 523.

(b) Reg. Lib. A. 1815, fol. 556.

[1] Vide post; *Harrison v. Hollins*, 471; *Bennett v. Colley*, 2 Mylne & Keen, 225. S. C. 1 *Cooper*, 248. *Ashton v. Milne*, 6 Sim. 369.

[2] Vide *Smith v. Evans*, 3 A. K. Marsh. (Kentucky) Rep. 217.

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 1823.—Burney v. Morgan.
 

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## \*MEMORANDUM.

[\*357]

1823, 13th April.—*Costs.*

ON this day the Vice-Chancellor said, that in Michaelmas term last he had stated to Mr. Walker, the registrar, certain questions, for the purpose of ascertaining in what cases the costs of a motion, where the court gave no directions as to the costs, became costs in the cause to a party to whom costs of suit were given upon the hearing. The information he had obtained was,

1st. That the party making a successful motion is entitled to his costs, as costs in the cause; but the party opposing it is not entitled to his costs, as costs in the cause.

2d. That the party making a motion which fails, is not entitled to his costs, as costs in the cause; but the party opposing it is entitled to his costs, as costs in the cause.

3d. That where a motion is made by one party, and not opposed by the other, the costs of both parties are costs in the cause.

The Vice-Chancellor added, that it was therefore the duty of the court, whenever by reason of special circumstances it was not the intention of the court that these rules should apply, to give particular directions with respect to the costs; but that the court very rarely gave any special directions with respect to the costs of a motion for the purpose of obtaining, continuing, or dissolving an injunction to stay proceedings at law, leaving the costs of such motions to abide the event of the suit.

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 \*BURNLEY V. MORGAN. MORGAN V. BURNLEY.

[\*358]

1823, 25th April, 31st May.—*Creditors.—Right of revivor.*

Where one of the plaintiffs in a creditor's suit dies after a decree, his personal representative has a right to revive. *Quere*, if before a decree.

A creditor cannot sue on behalf of himself and others, who have no common interest with him.

THE question which arose in this case was as to the right of parties to revive and prosecute the suit.

In the year 1765, Sir J. P. Pryce and his wife, being seised, in right of the latter, of the Eardleigh court estate, subject to certain mortgages, conveyed it to a trustee, in trust to sell. The estate was accordingly put up to sale, and John Bagnall became the purchaser, and paid a deposit. Bagnall entered into possession, and redeemed the subsisting mortgages; but did not pay the remainder of his purchase money; nor was any conveyance ever executed to him, though he and his devisees had all along continued in possession of the estate.

Sir J. P. Pryce died soon after the sale. Lady Pryce, his widow, in 1787 executed a mortgage of the estate in fee to John Morgan, to secure 1,500*l.*



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1823.—Burney v. Morgan.

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In 1799 she became indebted to John Burney, on bond, for 1,000*l.* on which judgment was entered up in the same year.

The original bill was filed in 1804 by Burney, on behalf of himself and all other judgment creditors of Lady Pryce, Morgan and Lady Pryce also joining as plaintiffs.

The defendants to that bill were Bagnall's devisees in trust, and the persons in whom the legal estate was vested under the conveyance in 1765 in [\*359] trust for sale. \*The bill insisted that Bagnall had entered into possession of the estate, not under the agreement to sell to him, but as mortgagee under the mortgages which he had redeemed; and it prayed, that the agreement for the sale of the estate might be declared not to be binding or to have been waived, the plaintiff, Lady Pryce, offering to re-pay the deposit; and that the plaintiffs might be let in to redeem the mortgages which had been vested in Bagnall;—or, if the court should consider the agreement for the sale to Bagnall binding, then that a specific performance might be decreed, and the rest of the purchase money paid to Lady Price.

In 1805 Lady Pryce died; upon which Burney and Morgan filed a bill of revivor and supplement against the defendants to the original suit, and also against the personal representative of Lady Pryce, praying that if necessary, an account might be taken of what charges and incumbrances there were affecting the Eardleigh court estate, and of the debts of Lady Pryce affecting the estate, or payable out of the purchase money.

In 1814 a decree was made in the cause, establishing the agreement for the sale of the estate, and directing the master to take the accounts usual in a creditor's suit.

In 1816 Burney died, and in 1817 his personal representative filed a bill of revivor, to which Morgan was made a defendant, as well as the original defendants, he having declined to revive the suit. The usual order of revivor was made, and the suit was prosecuted.

[\*360] \*In 1821 Morgan died; upon which his personal representative filed a bill of revivor, to which he made the personal representative of Burney a defendant, as well as the former defendants.

The court was now moved on behalf of the personal representative of Morgan (the plaintiff in this last suit), that the personal representative of Burney might be restrained from proceeding in her bill of revivor, and that he alone might prosecute the original decree.

After the notice of motion, Morgan's representative amended his bill of revivor, by making it a bill on behalf of himself and all other creditors of Lady Pryce.

Mr. Agar, for the motion, insisted that there could not be two plaintiffs to prosecute the same decree, and that the right to prosecute it belonged to the plaintiff in the last bill of revivor, as the personal representative of Morgan who was the surviving plaintiff in the original suit.

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 1823.—*Burney v. Morgan*.
 

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Mr. *Whitmarsh*, for the representative of *Burney*, insisted, that although *Morgan* was the surviving plaintiff in the original suit, yet that he had declined to revive it; and that the bill of revivor by the representative of *Burney* had been acquiesced in by *Morgan* during his lifetime.

The VICE-CHANCELLOR:—This motion supposes that the representative of *Burney* was irregular in the bill of revivor filed by her. I am not of that opinion. It is true that the death of *Burney*, who was the co-plaintiff as a judgment creditor, did not abate the suit, because the \*other [\*361] plaintiff, *Morgan* the mortgagee, could effectually prosecute the decree, and had full interest to do so until his debt was satisfied. But he had no interest in the further prosecution of the suit for the benefit of the judgment creditors, and the personal representative of *Burney* had therefore a right to claim, by revivor, the same power of prosecuting the suit for the benefit of the judgment creditors as *Burney* himself possessed. If *Morgan* had acted with the representative of *Burney*, they might have joined as co-plaintiffs in the bill of revivor. But the representative of *Burney* could not lose her right to revive because *Morgan* did not act with her, and was therefore well justified in filing her own bill of revivor, and making *Morgan* a defendant.[1] It is a mistake to suppose, that in consequence of this bill of revivor *Morgan* lost any right to prosecute the decree which he before possessed. Every party to a suit is an actor after a decree; and therefore the representative of *Burney*, and *Morgan*, and the other defendants, were all entitled to prosecute the decree upon the order of revivor. And if the situation of *Morgan*, as surviving plaintiff in the original suit, entitled him to a preference over the representative of *Burney* as a plaintiff in the bill of revivor, where both were acting with equal diligence, it was his own fault if he did not assert it.

If the representative of *Burney* had a right to file a bill of revivor, it necessarily follows that the representative of *Morgan* had an equal right so to do upon the death of *Morgan*, and that his bill is regular. And as the first personal representative of *Lady Pryce* was then dead, it was necessary to make the new representative of *Lady Pryce* a party to the bill of revivor, \*which had thus a double object. To this bill of revivor the represen- [\*362] tative of *Burney* was a co-defendant, and stands now in the same situation in the cause as *Morgan* himself stood after her bill of revivor. But in truth they are all actors, and this varying relation of plaintiff and defendant makes no substantial difference. It may be observed, that this decree goes farther than the record warranted; inasmuch as it provides for the administration of the estate for the benefit of all creditors; whereas the plaintiffs in the suit were only a mortgagee, and a judgment creditor. The representative of *Morgan* has, since this motion was depending, amended his bill of revivor, by stating it to be a suit on behalf of himself and all other creditors. This amendment was not necessary to support his bill of revivor, and can answer no useful purpose. A mortgagee has no common interest with the

[1] Vide *Story's Eq. Plead.* 296.

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 1823—Breton v. Lord Clifden.
 

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creditors at large, and cannot sue on their behalf. This motion being founded altogether on a misapprehension of the effect of the proceedings in the cause, and being wholly irregular, must be refused with costs. [1]

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[\*363]

## \*BRETON v. LORD CLIFDEN.

1823, 24th April, 30th May.

A married woman, being entitled to an annuity of 200*l.* out of the dividends of 10,500*l.* four per cent. stock, which, subject to the annuity, was divisible amongst the children of herself and her husband as he should appoint: the husband appointed 2,500*l.* to his eldest son. The court refused to order that sum to be transferred to the son, although the remainder would have been much more than sufficient to pay the annuity.

WILLIAM BRETON was entitled under the decree of the court to a life interest in a sum of 10,500*l.* four per cent stock, standing in the name of the accountant general; and after his death, his wife, Susannah Breton, was entitled to an annuity of 200*l.* for her life out of the dividends of this fund. And, subject to that annuity, the fund was divisible amongst the children of the marriage, as William Breton should appoint. William Breton duly appointed 2,500*l.* part of the 10,500*l.* to Eliab Bracknell Breton, the eldest son of the marriage.

A petition was now presented by William Breton, and Susannah his wife, and Eliab Bracknell Breton, praying, that the sum of 2,500*l.* so appointed to Eliab Bracknell Breton, might be sold, and the produce paid over to him.

Mr. *Sugden*, for the petition, admitted that there was a difficulty, owing to the interest which the wife of William Breton had in this fund, in respect of her annuity of 200*l.* But he contended that the sum of 8,000*l.* four per cent. stock, which would remain after the prayer of this petition was complied with, must be considered as ample security for an annuity of 200*l.*; and that a compliance with the prayer of this petition would not diminish the security for the annuity to such a degree as would induce the court to refuse the order.

Mr. *Phillimore* consented, for persons entitled to annuities chargeable on the life interest of William Breton.

[\*364] \*The Vice-Chancellor said, that as Mrs. Breton, as a feme covert, was incapable of consenting to a diminution of the fund by which the annuity of 200*l.* was secured for her in case she survived her husband, he did not consider that the order could be made; but directed the petition to stand over, that there might be time to inquire whether there was any precedent for such an order.

Mr. *Bell*, *amicus curiæ*, said, he recollected a case in which Lord Alvanley had refused to make a similar order.

The Vice Chancellor said, that no precedent was found for such an order;

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[1] The executor or administrator, and heir, cannot join in a suit for rent of land of the deceased; the rent previous to his decease going to his personal representative, and that accruing afterwards, going to the heir. *O'Bannon v. Roberts*, 3 Dana, (Kentucky,) 54.

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 1823—*Renvoize v. Cooper*.
 

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and that he could not diminish the security for the wife's contingent annuity, and must therefore refuse the prayer of the petition.

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**\*RENVOIZE v. COOPER.**

1823, 26th April.

Where, in a foreclosure suit, exceptions are taken to the master's report, and the time appointed for payment of the mortgage money is likely to elapse before the exceptions are heard, the defendant should apply to the court, upon the exceptions being filed, to have the time enlarged until the exceptions are disposed of.

THIS suit was instituted to foreclose the equity of redemption of a freehold estate, which had been mortgaged by the defendant Cooper, to one Timmins, deceased.

An order having been made, directing the master to settle the proper deeds for the re-conveyance of the mortgaged premises to the defendants, they insisted, that Timmins' heir at law was a necessary party to the re-conveyance. On the 27th February 1821, it \*was ordered, that the time [\*365] for foreclosing the defendants should be enlarged; and it was referred to the master to appoint a new time for payment of the principal and interest due on the mortgage; and to inquire, and state to the court, whether Timmins' heir at law was a necessary party to the re-conveyance. The master, by his report, directed the principal and interest to be paid on the 25th of August 1821, and certified that the heir at law was not a necessary party to the re-conveyance. On the 22d of June 1821, the defendants filed exceptions to the master's report. Pending these exceptions, the time appointed for payment of the principal and interest elapsed. The exceptions were, however, ultimately overruled.

Mr. *Phillimore*, for the plaintiffs, now moved that the defendants might be foreclosed.

Mr. *Pepys*, for the defendants, opposed the motion.

The VICE-CHANCELLOR:—The defendants, the mortgagors, should regularly have applied to the court to have the time appointed for payment of the principal and interest enlarged, until the exceptions should be disposed of. But I cannot, for this slip on their part, conclude their right of redemption. Let it be referred back to the master to compute subsequent interest, and to appoint a new time of payment.

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**\*SPARKE v. IVATT.**

[\*366]

1823, 29th April.

Where a decree directs issues to try the validity of moduses, and the plaintiff wishes to have the issues tried in a different county from that in which the lands lie, an order for that purpose cannot be inserted in the decree, but must be obtained by petition.

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 1823.—*Dowlin v. Macdougall and Hunter.*


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THE bill was filed by the rector of the parish of Cottenham, in Cambridgeshire, for an account of tithes. The defendants, by their answers, pleaded several moduses.

The Vice-Chancellor, at the hearing of the cause, directed issues to try the validity of some of the moduses. Upon which, Mr. *Wetherell*, for the plaintiff, requested that the issues might be directed, in the decree, to be tried in Essex, instead of Cambridgeshire.

The Vice-Chancellor said, that an order to that effect could not be made part of the decree, without consent; because the propriety of it depended upon circumstances which were extrinsic to the pleadings and proofs; but that a petition must be presented for the purpose of obtaining it.

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 [\*367]

 \*)*DOWLIN v. MACDOUGALL and HUNTER.*

 1823, 29th April.—*Parties.*

A share of an intestate's personal estate was assigned to trustees, in trust for the appointees of husband and wife; and in default of appointment, in trust for them and the survivor. Husband and wife sold and assigned this share. The husband died first, and then the wife, having bequeathed all personal estate to the plaintiff. The husband's personal representative is not a necessary party to a bill by the legatee to set aside the sale.

THE object of the suit was, to set aside a purchase which had been made by the defendant Macdougall, of a share of an intestate's estate, and to have the surplus of the moneys received by him on account of the purchase, after deducting the amount of the purchase money paid to the plaintiff.

After the pleadings had been opened, the counsel for the defendant Macdougall objected to the cause being heard, because the personal representative of Martin Dowlin was not made a party to the suit.

The following are the facts of the case, which it is necessary to state, in order to explain the grounds of this objection.

All the intestate's estate and effects recoverable under the letters of administration, had been assigned to the trustees in trust, as to one sixth part, for the appointees of Mr. and Mrs. Dowlin; and in default of appointment, in trust for them, and the survivor of them. Shortly after this assignment, Macdougall purchased this sixth part of Mr. and Mrs. Dowlin, and they assigned it to him accordingly. In 1815, Mr. Dowlin died; and in the next year Mrs. Dowlin died, having bequeathed all her estate, both real and personal, to the plaintiff. Letters of administration, with Mrs. Dowlin's will annexed, were granted to the defendant Hunter. Macdougall, as the bill alleged, had received 643*l.* 8*s.* 3*d.* on account of his purchase.

 [\*368] \*Mr. *Heald*, and Mr. *Barber*, for the defendant Macdougall:—As Mr.

Dowlin joined with his wife in the sale and assignment to Macdougall, there cannot be a doubt that he thereby reduced this share into possession. No

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 1823.—*Parry v. Wright and others.*


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person, therefore, is entitled to set aside this sale, except Mr. Dowlin's personal representative. But if there be a doubt even upon this question, it cannot be decided in the absence of Dowlin's personal representative.

*Mr. Bell, and Mr. Palmer, for the plaintiff.*

**THE VICE-CHANCELLOR:**—I think the personal representative of Mr. Dowlin is not a necessary party. If the sale to Mr. Macdougall be good, then he plainly has no interest; and if the sale be void, he has no interest, because, in substance, Macdougall remained a trustee for the purposes of the settlement; and Mrs. Dowlin having survived her husband became solely entitled under the settlement.

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\*THOMAS PARRY JONES PARRY, plaintiff, and HENRY WRIGHT, GRIFFITH [\*369]  
 PARRY, and WILLIAM ALEXANDER MADOCKS, and H. C. BERKLEY,  
 defendants.

1823, 1st and 5th May.—*Mortgage.—Priority.*

If a third incumbrancer, having constructive notice of the second mortgage, fails to keep the first security on foot for his protection, he is not entitled to stand in the place of the first mortgagee against the second.

IN April 1801, the defendant, Griffith Parry, being seised in fee of an estate in Carnarvonshire, subject to certain mortgages which were then vested in Sir Thos. Mostyn, Bart. executed a mortgage of it to the plaintiff, to secure 203*l.* 11*s.* 6*d.* and interest. In December 1807, he agreed to sell his estate, together with certain other lands, to Madocks, for 8,300*l.* out of which Madocks was to retain 5,010*l.* to pay off the incumbrances on the premises agreed to be sold; and also 1,800*l.* as the consideration for granting an annuity to G. Parry, to be charged on the same premises. Accordingly indentures of lease and release, dated the 15th and 16th of December 1807, were executed; by which, after reciting the mortgages to Sir Thomas Mostyn and the plaintiff, the agreement for the sale and for the payment of the incumbrances, including the plaintiff's mortgage, G. Parry conveyed the premises to Madocks in fee, and covenanted with him that the plaintiff and all the other incumbrancers should, on being paid their principal and interest out of the 5,010*l.*, execute to him proper assignments of their securities.

By indentures of lease and release of the 21st and 22d of June 1810, the release being made between Sir Thomas Mostyn of the first part; Madocks, of the second part; and Girdlestone of the third part; after reciting \*Sir Thomas Mostyn's mortgages, the conveyance to Madocks, and [\*370] that he was desirous of paying off those mortgages, and of procuring a re-conveyance of the mortgaged premises, Sir Thomas Mostyn in consideration of 3,220*l.* therein mentioned to have been paid to him by Madocks, in full

1823.—Parry v. Wright and others.

satisfaction of his claims under those mortgages, conveyed the premises, by the direction of Madocks, to Girdlestone in fee; and it was declared, that one Garnons, in whom the premises were vested for the residue of a term of five hundred years, in trust for Mostyn, should thenceforth stand possessed of the term in trust for Girdlestone, to attend the inheritance, and to protect it from all mense incumbrances.

By an indenture of even date with, and executed immediately after, and reciting the last-mentioned indenture, and also reciting that Wright had agreed to purchase of Madocks an annuity of 500*l.* for 5,000*l.* and that the 3,220*l.* were in fact the moneys of Wright, and part of the 5,000*l.* and were paid by Berkley, as Wright's agent, to Sir Thomas Mostyn, at Madocks' request, Madocks, in consideration of the 3,220*l.* paid to Sir Thomas Mostyn, and of 1,780*l.* the residue of the 5,000*l.* paid to him by Berkley, as Wright's agent, granted to Wright an annuity of 500*l.* to be issuing out of the premises purchased of G. Parry; and Girdlestone, by Madocks' direction, demised the same premises to Berkley for five hundred years, upon trust for better securing the annuity.

The plaintiff not having been paid the principal and interest due on his mortgage, filed his bill, and insisted that he was entitled, either to be paid [\*371] by G. Parry, Madocks, or Wright, or to foreclose their equity of \*redemption; and he charged that the 3,220*l.* ought to be considered as paid by Madocks out of the 5,010*l.* under the indenture of the 16th of December 1807: that the assignment of the securities for the 3,220*l.* was made in trust for Madocks, and not for Wright: that Wright had notice of this charge, or of the indentures of April 1801, and December 1807; that Wright's annuity deed recited the release of the 16th of December 1807, and the assignment of Sir Thomas Mostyn's securities: that thereby he knew, or ought to be considered as having had notice of the plaintiff's mortgage, and that Madocks had retained the 5,010*l.* out of the purchase money for paying off the incumbrances, and especially the plaintiff's mortgage, and had not done so; and that under these circumstances, although it was alleged that Wright had paid the 3,220*l.* yet that he paid it out of the purchase money for his annuity, and that he ought to be considered as having paid off, and that he did, in fact, pay off, the sums due to Sir Thomas Mostyn, on Madocks' behalf; and that thereby the plaintiff became the first incumbrancer on the premises. And the bill prayed a foreclosure against the defendants in the usual terms.

Wright, by his answer, stated, that when he contracted for his annuity, it was agreed that Sir Thomas Mostyn's securities should be paid off out of the 5,000*l.*, and that the 3,220*l.* paid to Mostyn were Wright's proper moneys and therefore ought not to be considered as paid by Madocks out of the 5,010*l.* He admitted that the assignment of Mostyn's securities was made to Girdlestone, in trust for Madocks; (a) but he said that his annuity deed bore

(a) There was no trust declared by the deed.

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even date with the assignment, \*and that Girdlestone was made a party [\*372] to the annuity deed the more effectually to secure to him all the benefit of that assignment, in consideration of his money having been applied in paying off the incumbrances. He denied that he had any notice of plaintiff's charge, or of the indentures of April 1801, and December 1807, before he paid the 5,000*l.*; but he admitted that the assignment of Mostyn's securities, and also the release of the 16th of December 1807, were recited in his annuity deed; but he added, that the latter deed was recited as follows: "That by indentures of lease and release, bearing date respectively on or about the 15th and 16th days of December 1807, and made, &c. It was witnessed, that, for the consideration therein mentioned, the said G. Parry did grant, bargain," &c.: and he submitted, that he ought not to be considered as having had notice of the plaintiff's mortgage, or that Madocks had retained the 5,010*l.* out of the purchase money for paying off the incumbrances, but had not done so; and that he was the first incumbrancer on the premises; and that the plaintiff had no claim thereon until he had paid to him, Wright, the 3,220*l.* and interest.

Mr. Bell, and Mr. Koe, for the plaintiff:—

I. Wright had sufficient notice of the plaintiff's security. The release of December 1807 expressly takes notice of the mortgage to the plaintiff. The deeds of June 1810 state Madocks' title to be under the lease and release of December 1807; and those deeds state that he has no title except under certain mortgages, and, amongst them, the mortgage to the plaintiff; therefore no purchaser from Madocks can be permitted to say he had no notice of these mortgages. Although the 3,220*l.* was Wright's money, yet it was \*paid through Madocks, and the securities were assigned to his trustee [\*373] so that it was, in fact, a mere payment by Madocks.

II. The principle upon which Sir William Grant decided *Toulmin v. Steere*(b) applies in this case. Madocks had an estate subject to an agreement, by which he was expressly bound to pay off certain mortgages, and therefore he had nothing at all but an equity of redemption in the premises. He contracted with Wright, who knew that there were those charges and incumbrances on the estate, to borrow of him 5,000*l.* and at the same time stipulated that those mortgages and incumbrances should be conveyed to a trustee for him. Girdlestone being a trustee for Madocks was of course a trustee for the express purpose of taking care that these mortgages were paid. The conveyance to Girdlestone is not made in the usual way to protect the parties. If that had been their intention they would have taken an assignment of the mortgages. They do not do so; but they completely extinguish the mortgages. The effect would have been quite different if the mortgages had been

(b) 3 Mer. 210.



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 1823.—*Parry v. Wright and others.*


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conveyed to Girdlestone as a trustee for Wright, subject to the equity of redemption; but the deed expressly declares that the estate was not to remain subject to the equity of redemption. Unless it had been declared that these mortgages had been given as a security for the annuity, Wright could not have set them up as subsisting against Madocks. Though they were not conveyed to Girdlestone in trust for Madocks expressly, yet it amounts to the same thing; for it appears that they were paid [\*374] off with Madocks' money; and then they were assigned to \*Girdlestone by the direction of Madocks; so that Girdlestone is a trustee for Madocks, who paid the money with which the mortgages were discharged. It would be a fraud to consider it in any other way; for the intention was not that Wright should become the purchaser of these securities, but that he should be an annuity creditor of Madocks, and not stand in the place of the mortgagees. He does not even purchase the equity of redemption; but he takes the annuity; which is a distinct thing. The question is, whether, as against the plaintiff, of whose mortgage he had notice, he can now say that it was not the intention that he should be an annuity creditor, but a mortgagee. It is clear that he never could contend, as against Madocks, that he was any thing but an annuity creditor; and if not, can he say, that, as against the plaintiff, he stands in the situation of a mortgagee, and that he has a right to foreclose him: Admitting the assignment to Girdlestone, and the demise to Berkley, to be but one transaction, still the effect of it was to extinguish the mortgage right, and to create a new substantive right. The purpose of it was, not to maintain in Wright the character of mortgagee against the plaintiff, but to create a new character in him as against Madocks, and, therefore, a new character in him as against all those whose claims were prior to Madocks'. And if Wright had lost his character of mortgagee against Madocks' he has lost it against the plaintiff, who, by foreclosure, is entitled to stand in Madocks' place.

Mr. *Heald*, Mr. *Sugden*, and Sir *George Hampson* Bart. for the defendant:—Prior to the plaintiff having any charge upon this estate, it was subject to certain incumbrances which exhausted the whole fee-simple, and dis- [\*375] vested the legal \*estate. Then he takes a mortgage, which was only an equitable one, subject to all the debts on the estate; and then Madocks buys the estate, not with any privity or concurrence of the plaintiff, but subject to the mortgage and all the other incumbrances; and he agrees with the sellers that he should pay off all incumbrances. Now that gives no right to the plaintiff, as he was no party to that agreement. For it has been decided that where a party creates a charge in favor of a person who is not privy to the transaction, the incumbrance may be discharged without that person's consent. There is also the case of *Wallwyn v. Coutts*,<sup>(c)</sup> where it was held

(c) 3 Mer. 707.

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that the court would not give a party in the situation of the plaintiff any benefit of an agreement for which he gave no consideration. *Forbes v. Moffatt*. (d) This arrangement was made for the convenience of the other parties. There was never any intention to give the plaintiff any priority or preference which he did not before possess. All that was intended was, to place Madocks in the place of the sellers. So that it stands thus: Madocks had an equity of redemption, and the intention of the parties was, that as there was a prior load of debt riding over the plaintiff's mortgage, the person who advanced the money should have the benefit of the prior incumbrances. Suppose that Mostyn had transferred his mortgages without Madocks' concurrence, Wright would then have stood in Mostyn's place. The concurrence of the party having the equity of redemption does not place him in a worse situation. If the money had belonged to Madocks himself, then perhaps Wright might have stood in a worse situation than Mostyn did. The plaintiff cannot vary the case as it really stands; he cannot have more equity than \*he had [\*376] before. He does not contract to come into Mostyn's place. The deed by which Mostyn's securities were assigned was executed at the same time as this annuity was granted; and Wright's money was paid in satisfaction of what was due upon those securities. Not one shilling of the money so applied belonged to Madocks. The person to whom those securities were assigned took them in priority to the plaintiff. The plaintiff had no equity to come in between Madocks and the persons who sold these securities to him. That arrangement was not made for his benefit. He stands with all the rights he had before. His situation is neither better nor worse. When the money did not go, even nominally, through Madocks, but was paid into the hands of Mostyn himself, what right has the plaintiff to say that the mortgages were paid off for his benefit. The only way he shapes his case is, that Madocks had agreed to pay off these mortgages. Were these securities merged by this agreement? Clearly not. If there had been any intention to merge them (which would have been a gross fraud upon Wright) the assignment would have been made to Madocks himself. But here the incumbrances are kept on foot in the name of Girdlestone. No injustice is done by this measure to the plaintiff, for no attempt was made to postpone him; but he was left in precisely the same situation as he was in before. The case of *Toulmin v. Steere* is different from this. In that case, the party thinking that he had been buying an unincumbered estate, and that he had paid off that mortgage which was the first security, had the fee vested in himself; and then it was said, that as he had bought the fee with constructive notice of the incumbrance, he could not set up the mortgage against his own incumbrancer; that the prior security was gone, and that the second \*incumbrancer thereby became the first. Besides, the pur- [\*377]

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chaser in that case had no legal estate to protect himself with; and therefore necessarily became subject to the claim of a second incumbrancer to become the first. That case does not apply here; for here the parties had clearly a right in law to say that these subsisting incumbrances should not be merged but be kept on foot, in order that Girdlestone might, by a subsequent deed, transfer them to Wright as a security for the annuity; and Girdlestone does actually transfer to his trustee the portion which he had acquired in the estate from the first mortgagee. The assignment to Girdlestone, and the demise by him to Wright's trustee, are all one transaction. Suppose that the arrangement had been effected by one deed only, and that every incumbrance had been recited in it, including the plaintiff's, and that it had been then said that Mostyn was pressing for his money, and that Madocks was desirous to procure somebody to take a transfer of Mostyn's securities, and that Wright had refused to be a mortgagee, but was willing to advance the money by way of annuity, what objection could then have been made to the claim of priority we are now supporting? Mostyn having stood as first incumbrancer had a right to transfer his securities to whomsoever he pleased, and to transfer with them the right of priority which he possessed. By this means no intermediate incumbrancer was let in; but all parties were dealt with according to their respective rights. Girdlestone is, in some respects, treated as the owner of the estate. No trust is declared for Madocks; because it was the intention of the parties that the securities should be kept on foot for Wright's benefit. As there can be no doubt that, if these mortgages had been kept as subsisting mortgages, they would have been good and valid against the plaintiff, [\*378] \*and that he would have had the same priority as he had before, the question is, whether the form of the transaction vesting the fee simple in Girdlestone, and the subsequent demise by him to Berkeley as a trustee for an annuity creditor and not for a mortgagee, be a discharge to the plaintiff, and relieves him from all the securities given to Mostyn. The court looks at the substance, and not at the form, of the transaction; what then was intended by this transaction? As against Madocks, it was to secure an annuity of 500*l.* per annum; and as to the persons who claimed posterior to Madocks, to secure that same annuity as against them. Then why should they not be considered as subsisting securities as against those persons? Has any injury been done to them? Who can say that they are not mortgage securities? As the legal estate has never found its way to Madocks, the plaintiff cannot call upon us to give him the prior legal estate which we have gotten as a consideration for our annuity. That would be against the nature of the transaction; the object of which was to give us the benefit of Mostyn's securities. And we cannot be deprived of that benefit by the form of our conveyance. That conveyance was not meant merely to destroy the mortgages, and to let in the plaintiff as the first incumbrancer. We never

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contracted to be owners of this estate discharged of all incumbrances ; but we contracted for the benefit of the prior incumbrances. We have never discharged those incumbrances ; for though we have got the legal fee in Girdlestone, no trust was ever declared for Madocks ; but it was for our benefit. The plaintiff must show some distinct ground which has discharged the property against the real nature of the contract and the justice of the case. He has given no other consideration for the estate than what he gave in the year \*1801 : what equity can he then have to oust us of that which we [\*379] have legally bought, unless he will repay us the money which we have expended in buying up these securities ? The purchaser of the annuity is the purchaser of the estate to the extent of that annuity ; and every purchaser is allowed to take in prior incumbrances. If the contrary is held in this case, where there is no fraud or unfair dealing, but the money was fairly advanced, it will shake many securities in a manner we cannot anticipate.

Mr. *Girdlestone*, for the defendant Berkley :—The defendant Madocks was out of the jurisdiction of the court, and the bill had been taken *pro confesso* against him.

The VICE-CHANCELLOR :—When the money of the defendant Wright was applied in satisfaction of the mortgage debt due to Sir Thomas Mostyn, the parties might have made an arrangement which would have kept Sir Thomas Mostyn's securities on foot as against the plaintiff Jones Parry. If they have failed to do this, no court can give an effect to their instruments contrary to their own clear and express intention. I agree that it is of no consequence that the grant of the annuity, and the redemption of Sir Thos. Mostyn's mortgage, are split into two instruments, and that the whole is to be considered as one transaction. Mr. Wright, who was actually, though not constructively, ignorant of the existence of the plaintiff's mortgage, agrees to give Mr. Madocks 5,000*l.* for the purchase of an annuity, upon condition that 3,220*l.* part of the sum, is applied in redemption of the mortgage to Sir Thomas Mostyn, which he seems to have considered as \*the only in- [\*380] cumbrance upon the estate. The money is accordingly paid to Sir Thomas Mostyn, and the fee of the estate is vested in Girdlestone, in trust for Mr. Madocks, and then, out of this fee, Mr. Girdlestone grants by the direction of Mr. Madocks, a term of five hundred years to Mr. Berkley as a trustee for Mr. Wright, for the purpose of securing his annuity. How then can Mr. Wright, who accepts this term of five hundred years from Mr. Girdlestone, as a trustee of the fee for Mr. Madocks, contend that it was not the true intention of this transaction that Mr. Girdlestone should hold the fee in trust for Mr. Madocks. If it were the true intention of this transaction that the fee conveyed by Sir Thomas Mostyn should vest in Mr. Girdlestone as trustee for Mr. Madocks, then the consequence is unavoidable, that neither Mr. Madocks, nor any person claiming under him, with notice of the plaintiff's mort-

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 1823—*Casamajor v. Strode*.
 

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gage, can ever set up this fee against the title of the plaintiff. And it is not denied that Mr. Wright had constructive notice of the plaintiff's mortgage. The plaintiff, therefore, is to be considered as the first incumbrancer upon this estate, and is entitled to his decree accordingly{1}

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[\*381]

\*CASAMAJOR v. STRODE.

1823, 9th May.—*Practice*.—*Injunction*.

An injunction may be obtained, upon motion, to restrain a purchaser under a decree, not a party to the cause, who has not paid his purchase money, from committing waste on the property purchased.

On the 27th of July 1822 an order was made in this cause, on the application of the plaintiff, that Mr. Burk, the purchaser of lot 5, part of the estates in question in the cause, should either pay his purchase money into court, on or before the first day of Hilary term then next, or should deliver up the possession which he had acquired of the purchased premises.

Mr. Burk having paid no attention to this order,

Mr. *Bell*, for the plaintiff, now moved, upon affidavit, that Mr. Burk might be ordered to deliver up the possession of the premises within a week, and that, in the mean time, he might be restrained by the injunction of the court from felling, topping, or removing any timber or other trees or underwood, on or from the premises, and also from making bricks, tiles or pipes thereon, and from committing any waste, spoil, or deterioration on the premises; and he said, that although Mr. Burk was merely a purchaser, and not a party to the cause, yet the court would grant the injunction.

The VICE CHANCELLOR:—The purchaser under a decree does, by the act of purchase, submit himself to the jurisdiction of the court as to all matters connected with that character. Take the injunction as prayed. [2]

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[\*382]

\*CHAMBERS v. ATKINS.

1823, 10th May.—*Settlement*.—*Construction*.

Settlement of a sum of money upon trust, to be transferred to the surviving parent, for the benefit of him or her, and any child or children of the marriage; held, upon construction of the whole instrument, that the surviving parent took for life, with remainder to the children.

THIS suit was instituted for the purpose of having the rights of Samuel Chambers and his children declared, as to a sum of 666*l.* 13*s.* 4*d.* stock. The bill was filed by the children, who were all infants, against their father,

[1] Vide *Brown v. Stead*, 5 Sim. 535.

[2] Ante *Marriott v. White*, 17, and note *id.*

1828.—*Chambers v. Atkins.*

and the trustee in whose name the stock stood ; and the question was, as to the construction of the marriage settlement by which the trusts of this fund were declared. The settlement was dated the 9th of March 1807, and was made in the West Indies, previous to the marriage of the defendant, Samuel Chambers, with Susannah his wife ; and the parties to it were the intended wife, and her father, of the first part, the defendant, Samuel, of the second part, and two trustees of the third part. By this deed the husband assigned and transferred the sum of 4000*l.* to the trustees, upon trust to invest it in the public funds, and to pay the dividends to him during the joint lives of himself and his wife ; and, on his decease, in case his wife should survive him, upon trust to transfer the trust fund to her, her executors and administrators, to and for the use of her and any child or children of the marriage. The settlement then proceeded in these words : “ But in case the said Samuel Chambers, should survive the said Susannah Wylly his intended wife, upon trust to re-assign and transfer the sum of 4000*l.* or such public stocks or government securities as may have been purchased with the same, unto the said Samuel Chambers, his executors and administrators, to and for the use and benefit of him, the said Samuel Chambers, and any child or children of the said intended marriage.”

\*After the marriage, the trust fund was invested in the purchase of [\*383] 666*l.* 13*s.* 4*d.* three per cent. stock. The wife died in 1813, leaving the plaintiffs, the only issue of the marriage.

The bill insisted that the plaintiffs, and their father, the defendant, Samuel Chambers, became, on the death of their mother, each entitled to have one fourth share of the trust fund, and to have each share transferred to them, or secured for their benefit. The defendant, Samuel Chambers, by his answer claimed to be entitled to the dividends for life ; and submitted, that according to the true construction of the settlement, his children, on his death, would be entitled to the principal in equal shares.

Mr. *Horne*, and Mr. *Roupell*, for the plaintiffs.

Mr. *Robert Roupell*, for the defendant, Samuel Chambers.

Mr. *Agar*, and Mr. *Beames*, for Atkins, the trustee.

The VICE-CHANCELLOR :—During the joint lives, the husband and wife had plainly an equitable interest in the dividends. At the death of either, the principal sum was to be paid or transferred to the survivor, his or her executors or administrators, so as to vest in the survivor the absolute legal interest and possession ; and there arise three questions :

*First.* Was it the intention that this money should be placed at the disposition of the surviving parent, for the purpose of enabling such parent the better to \*provide for the family ; or, *Secondly*, that the [\*384] surviving parent should take for life, and the children in remainder ; or, *Thirdly*, that the surviving parent and the children should take as joint tenants ?

1223.—Teale v. Teale.

The latter construction is favored by the immediate expression. But if this had been the purpose of the instrument, the trustees would not have been directed to transfer the fund to the surviving parent, his or her executors, or administrators; but would have been directed to hold upon trust, for the equal benefit of the surviving parent and children. The first construction has some support in probable intention; but the strong expression that the surviving parent is to hold the 4000*l.* to and for the use of him or her, and the child or children of the marriage, cannot, I think, be safely treated as conferring no interest upon the children. And upon the whole, in this very doubtful case, I am disposed to adopt the middle construction, and to say, that the intention was not only to provide for the surviving parent, but to make a certain provision for the child or children of the marriage, and yet not to create an immediate trust for the equal benefit of the surviving parent and children; and that the surviving parent was to enjoy the fund for life, (which in some measure accounts for the fund being transferred to the surviving parent) and that the children were to take in remainder after the death of the surviving parent.

The fund must therefore remain in court during the life of the father, and the dividends be paid to him, with liberty to any party interested to apply at his death.

[\*385]

\*TEALE V. TEALE.

1823, 15th May.—*Practice*—*Publication of depositions in suits to perpetuate testimony.*

The court will not order copies of depositions taken to perpetuate the testimony of witnesses to be delivered out for the purpose of perfecting the title to an estate, even where the witnesses are dead.

THE object of this suit was to have the testimony of witnesses perpetuated as to the legitimacy of the plaintiff, whose title to an estate depended upon his being the legitimate son of one R. Teale.

The witnesses who had been examined as to the fact in question had since died; and the plaintiff having agreed to sell the estate, and being unable to find the register of his birth or baptism, the purchaser refused to complete his contract, unless the plaintiff could produce copies of the depositions of the witnesses.

Mr. *Roupell* moved, upon affidavits of these facts, that the plaintiff's clerk in court might be ordered to deliver a copy of the depositions to the plaintiff or his solicitor; and he cited *Harris v. Cotterell*.<sup>(a)</sup>

THE VICE-CHANCELLOR:—The registrar has produced to me a late case before the Lord Chancellor, in which a similar application being made for a similar purpose, his lordship refused the order; and I adopt that precedent.

(a) 3 Mer. 678.

1823.—Price v. Price.

## PRICE v. PRICE.

[\*386]

1823, 15th May.—*Opening of biddings.*

Where several lots have been purchased by the same person, and the biddings are ordered to be opened as to some of them, which were first purchased, the purchaser will be allowed the option of opening the biddings as to the remainder.

MR. TRESLOVE moved to open the biddings for five out of seven lots that had been bought by the same person.

Mr. *Knight*, for the purchaser, said, that where the same person purchased several lots, and the biddings were opened as to some of them, it was usual to give him the option of retiring from the remainder; and he cited *Boyer v. Blackwell*.(a)

The Vice-Chancellor asked whether the lots which were the subject of the motion had been sold before or after the other two lots; and being informed that they were sold after, he said, that where a person became the purchaser of a subsequent lot, in consequence of his being declared the best bidder of a prior lot, it was reasonable that he should have the option of retaining or retiring from the subsequent lot.

The same point occurred again before the Vice-Chancellor, on the 6th December 1823, in the case of *Fielder v. Fielder*; and the Vice-Chancellor made the order for discharging the purchaser as to the subsequent lot, upon an affidavit of the purchaser that he had bid for the lot in consequence of having been declared the best bidder for the prior lot, the bidding of which was opened.[1]

## \*HORWOOD v. WEST.

[\*387]

1823, 15th and 31st May.—*Will.—Construction.—Trust.*

Testator gave to his wife all his personal estate, relying, that if she should marry again she would secure whatever she should possess under his will for her separate use; and he recommended her to give, by her will, what he should die possessed of under his will to certain persons whom he named; held, that the wife's executor was a trustee of the whole of the property possessed by her under the will for the persons named.

JOHN POWELL, by his will, gave to his wife, Margaret Powell, all such ready money, money out at interest, or in the public funds, or upon government or real security, debts and securities for money, as he should be possessed of, interested in, or entitled to at the time of his decease; and also all

(a) 3 Anst. 656.

[1] Vide *Garstone v. Edwards*, ante, 20.



1823.—*Horwood v. West.*

his household furniture, stock in trade, plate, linen, and china, as also all other his estate and effects whatsoever and wheresoever, for her own sole use and benefit, relying on her, that if she should thereafter intermarry, she would secure to herself whatever she should possess herself of by virtue of his will, so that the same should not be subject to the debts, contracts, control, or engagements of any husband she might so thereafter intermarry; and be thereby recommended his wife that she should, by her will, give and bequeath what she should die possessed of under his will, in manner following, that is to say; one moiety or half part between and amongst his two sisters, Lettice and Mary, in equal shares and proportions, if they should be living at the time of her decease; but if they should not be living at that time, then to direct the same to be paid and divided amongst all and every such of the child or children of his sisters Lettice and Mary as should be living at the time of their decease, in equal shares and proportions; and the other moiety or half part be directed to be divided between Jane Gordon and Ann Roderick, his wife's two sisters, in equal shares and proportions; but if they should not be living at the time of her decease, then to direct that moiety or half part to [\*388] be paid and \*divided between and amongst all and every such of the child or children of Jane Gordon and Ann Roderick as should be living at the time of their decease, in equal shares and proportions; and he appointed his wife and the defendant executrix and executor of his will.

Mrs. Powell, after her husband's death, possessed herself of the whole of his personal estate; and after paying his debts, and funeral and testamentary expenses, applied the whole of the residue to her own use, except a part, which she invested in the purchase of 400*l.* stock, in the joint names of herself and the defendant, West. By her will she gave all her stock in the public funds standing in the names of West and herself, and all the residue of her personal estate, one half to Lettice, and the other half to Mary, the two sisters of her late husband John Powell; and in case of the death of either of them in her life-time, she gave the share of the one so dying to her children, in equal parts, and appointed the plaintiff her executor.

Mrs. Powell received the dividends of the 400*l.* stock during her life; and at her decease, that sum remained standing in her and the defendant's joint names. The bill prayed that West might be decreed to transfer the stock to the plaintiff, for the purposes of the will.

Mr. *Bell*, and Mr. *Parker*, for the plaintiff, referred to 2 Roper on Legacies, chap. 16, p. 308, in which the cases on the subject were collected, and to *Attorney General v. Hall*.(a)

Mr. *Temple*, for the defendant.

[\*389] \*The VICE-CHANCELLOR:—It is essential to the execution of a trust that the subject should be certain; and if this testator intended that his wife should, at her pleasure, during her life, dispose of the property which he left

1822.—*Horwood v. West.*

to her, and that his recommendation should extend only to what, if any thing happened to remain of his property at her death undisposed of by her, then there is no trust to be administered by this court. It is true, that in terms his recommendation is, that she shall by her last will and testament give and bequeath what she shall die possessed of, under and by virtue of that his will, in manner therein stated; and, if these words were uncontrolled by any other part of the will it would be to be implied that he had in his view only what she should happen to have left at her death, and not all that he had given to her. But in a prior part of the will he directs that, upon a second marriage, whenever that may happen, the whole of the property which he gives to her, and not such part only as may have been then undisposed of by her, shall be secured to her separate use. A second marriage was at all times possible until her death; and whenever a second marriage happened, the whole of his property was to be secured; and a power to dispose of any part of the property absolutely, at any time during her life, is not to be reconciled to that provision, when he recommends her to give, in the manner stated, what she should die possessed of under his will. I must, therefore, consider that he had in view the whole property which she should possess under his will; and that the expression is equivalent to a recommendation to give the whole property which she should so possess.[1]

Dismiss the bill without costs.

[1] That the subject must be certain, see Reporter's Note to *Lawless v. Shaw*, Lloyd & Gould 175. So, the object must be certain. Ibid. and cases there cited. A will concluded in these words: "In case there is any money remaining, I should wish it to be given in private charity;" it was held that the object was too indefinite; and as the executors under the circumstances of the case, did not take a beneficial interest, the residuary personal estate went to the next of kin. *Osmanney v. Butcher*, 1 Turn. & Russ. 260. See also, *Legge v. Asgill*, note, ibid. The testator gave the residue of his property to his wife, recommending to her and not doubting that she would consider his near relations, as he would have done if he had survived her;—the object was too indefinite to create a trust and the wife took the residue absolutely. *Sale v. Moore*, 1 Sim. 534. So, where the testator, after giving his real and personal estates to his wife in fee, said that he had so given the same to her unfettered and unlimited, in full confidence that, in her future disposition thereof, she would distinguish the heirs of his late father, by devising the whole of his estate, together and entire to such of his father's heirs as she might think best deserved her preference; it was held that no trust was created. *Meredith v. Heneage*, 1 Sim. 542. A testator bequeathed to his daughter A., the wife of B., a legacy of 10,000*l.* payable six months after his decease; and he recommended his daughter and her husband to settle it with such sum of money of the husband as he should choose for the benefit of A. and her children. "I am of opinion," says the M. R. that a trust was created. The word *recommend* as here employed is imperative, according to the authority of several cases; the subject of the recommendation, the disposition of which the testator had power to command, was the certain definite sum of 10,000*l.* and the objects of the recommendation were the children of the daughter. I am of opinion that the husband could not have claimed the legacy in right of his wife, and that the wife could not have claimed it for her own use." *Ford v. Fowler*, 3 Beav. 146.

A recommendation by a testator to his son to continue his nephews in the occupation of his farm as heretofore, and so long as they continue to manage the same in a good and husbandlike manner, and to duly pay their rents, is imperative. *Tibbitts v. Tibbitts*, Jacob, 317. The testator's desire, in connection with other parts of the will, that a certain person should be continued in the agency

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of the estate is imperative. *Lawless v. Shaw*, Lloyd & Gould, 154, and notes *ibid.* "The first case that construed words of recommendation into a command, made a will for the testator; for every one knows the distinction between them. The current of decisions has, of late years, been against converting the legatee into a trustee." The Vice-Chancellor, in *Sale v. Moore*, 1 Sim. 534. The effect of precatory words in a will was so fully discussed in a late case before Lord Langdale, M. R. (*Knight v. Knight*, 3 Beav. 148, decided August 7, 1840,) that the editor trusts he will be excused for the introduction in this place of some copious extracts both from the arguments of counsel and the judgment of the court. It arose under the will of Richard Payne Knight, a person of considerable literary celebrity. Without noticing the various provisions of the will, it will be sufficient for the present purpose, to extract merely the following clause. After giving some small legacies he proceeded thus: "I trust to the liberality of my successors to reward any others of my old servants and tenants according to their deserts, and to their justice in continuing the estate in the male succession, according to the will of the founder of the family, my above-named grandfather." It was contended on the part of the plaintiffs that the words of the will were imperative. Their counsel argue thus: "It has been now firmly established by a long series of decisions, that whenever a person gives property, and points out the object, the property and the way in which it shall go, that creates a trust; unless he shows clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it." "If a testator shows a desire that a thing shall be done, unless there are plain express words or necessary implication, that he does not mean to take away the discretion, but intends to leave it to be defeated, the party shall be considered as acting under a trust." "To create by precatory words such a trust as the court will carry into execution, there are three requisites; first, the precatory words must be sufficiently clear; secondly, there must be a certainty in the subject of the gift; and thirdly, the objects to take must be certain." "As to the first requisite, no particular form of words is necessary; it is sufficient for a testator to express a desire as to the disposition of the property, and the desire so expressed amounts to a command." In short "any words of recommendation and desire in a will are always expounded a devise." "By the civil law, from which most probably the principle was adopted by courts of equity, words of request or confidence, *rogo, volo, mando, injungo, desidero, deprecor, fidei tua committo, scio te hereditatem meam restitutum Titio*, are those by which a *fidei commissum* is created; but effect is given to a *fidei commissum*, if it can be collected from any expressions in the instrument that it was the grantor's or testator's intention to create it;" and like a declaration of a use in equity, where there has been a transmutation of possession, "any expression whereby the mind of the party may be known that such a one shall have the land is sufficient." Secondly, the subject of the gift is sufficiently certain, being the estates and personal property devised and bequeathed by the will. Thirdly, the persons to take are sufficiently defined being persons in the male line in succession; a description much more perfect than the expressions "family," "relations," which have been held sufficiently certain to be carried into execution. Applying these principles to the present case, the court finds the testator "trusts to the justice, &c." and he "appoints the person who shall inherit his estates his sole executor and trustee to carry the same and every thing contained therein duly into execution, confiding in the approved honor and integrity of his family to take no advantage of technical inaccuracies." "These words of trust and confidence are much stronger than many which have occurred, besides which the person inheriting was also distinctly appointed a trustee to carry the will into execution." On the other side it is said, "the principle of holding precatory words to be imperative has been frequently disapproved of, and the current of modern authority is strongly against it. Lord Chief Baron Richards, speaking of the former decisions on this subject thus expressed himself; (10 Price, 265;) 'I hope to be forgiven if I entertain a strong doubt whether in many or perhaps in most of the cases, the construction was not adverse to the real intention of the testator. It seems to me very singular, that a person who really meant to impose the obligation established by the cases, should use a course so circuitous, and a language so inappropriate and also obscure, to express what might have been conveyed in the clearest and most usual terms—terms the most familiar to the testator himself, and to the professional or any other person who might prepare his will. In considering these cases, it has always occurred to me, that if I had myself made such a will as has generally been considered imperative, I should have never intended it to be imperative; but on the contrary, a mere intimation of my wish that the per-

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son to whom I had given my property should, if he pleased, prefer those whom I postponed to him, and who next to him, were at the time the principal object of my regard.' In *Wright v. Atkyns*, (1 Ves. & B. 315,) Lord Eldon says, 'this sort of trust is generally a surprise on the intention, but it is too late to correct that.' Again he says, 'we know the question was, what the word family meant? I do not believe that the testator intended a mere trust, but that must be the construction if the word 'family' is properly construed.' In the same case Lord Redesdale said 'that a] cases of this description were to be considered with very considerable strictness, as it was a very inconvenient mode of disposition.' The words used by the testator are not, and were not intended to be imperative upon his successors. There are three instances in which he expresses his confidence; first, he '*confides in the approved honor and integrity of his family to take no advantage of technical inaccuracies, but to admit all the small reservations out of the property; secondly he trusts to the liberality of his successors to reward old tenants and servants; and thirdly, he trusts to their justices in continuing the estates in the male succession.*' In neither of these cases was it the intention of the testator to bind his family, and in every of them he would have deprecated the interference of this court. If his wishes had been consulted, they undoubtedly would have been to have continued the estate in the family *for ever*. He was aware that this could not be effected by any legal means, he knew that he could not effectually settle his estate so as to be unalienable, further than the minority of the first tenant in tail; and he therefore considered the best mode to accomplish his wishes was to trust to the *honor* of his successors, and to impose on them what is termed an *imperfect obligation*, which was to be binding morally only." The counsel insist that "the words are not sufficiently strong to be construed imperative. The testator trusts to their justice, a word clearly importing no legal obligation." The counsel further contended that there was a want of certainty as to the subject and the persons to take as to the extent of their interest. *The Master of the Rolls*.—"As a general rule it has been laid down, that when property is given absolutely to any person, and the same person is, by the giver, who has power to command, recommended, or entreated, or wished, to dispose of that property in favor of another, the recommendation, entreaty, or wish shall be held to create a trust; first, if the words are so used, that upon the whole they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; and thirdly, if the objects or persons intended to have the benefit of the recommendation or wish, be also certain. In simple cases there is no difficulty in the application of the rule thus stated. If a testator gives 1000*l.* to A. B. desiring, wishing, recommending or hoping that A. B. will at his death, give the same sum, or any certain part of it to C. D. it is considered that C. D. is an object of the testator's bounty, and A. B. is a trustee for him. No question arises upon the intention of the testator, upon the sum or subject intended to be given, or upon the person or object of the wish. So, if a testator gives the residue of his estate, after certain purposes are answered, to A. B., recommending A. B. after his death, to give it to his own relations, or such of his own relations as he shall think most deserving, or as he shall choose, it has been considered that the residue of the property, though a subject to be ascertained, and that the relations to be selected, though persons, or objects to be ascertained, are nevertheless so clearly and certainly ascertainable—so capable of being made certain, that the rule is applicable to such cases. On the other hand, if the giver accompanies his expression of wish, or request by other words, from which it is to be collected, that he did not intend the wish to be imperative; or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of the wish or request, or if the objects are not such as may be ascertained with sufficient certainty, it has been held that no trust is created. Thus the words 'free and unfettered,' accompanying the strongest expression of request, were held to prevent the words of the request being imperative. Any word by which it is expressed, or from which it may be implied, that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being considered certain, and a vague description of the object, that is, a description by which the giver neither clearly defines the object himself, nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interest the object or class of objects is to take, will prevent the objects from being certain within the meaning of the rule; and in such cases we are told (2 Ves. jun. 632, 635,) that the question 'never turns upon the grammatical import of words—they may be imperative, but not necessarily so, the subject matter, the situation of the par-

1823.—*Houghton v. Franklin and others.*

[\*390]

\*HOUGHTON v. FRANKLIN and others.

1823, 3d and 28th June.—*Will.—Annuity.*

Where an annuity is given by will with a direction that it shall be paid monthly, the first payment is to be made at the end of a month after the testator's death.

ADMIRAL GRAVES made two codicils to his will. In the second codicil was contained the following bequest:

"I give and bequeath unto Rebecca Houghton and her mother, the sum of 160*l.* per annum, clear of all expenses; they are to be paid 13*l.* 6*s.* 8*d.* monthly. In case her mother should die first, the same to be continued to the daughter; provided that she remains single." The testator bequeathed the residue of his personal estate to the defendants, Maria Franklin and Elizabeth Edwards.

The bill was filed by Rebecca Houghton and her mother, for the usual accounts of the testator's personal estate; and to have a sufficient part of the residue appropriated for securing the annuity of 160*l.*

In the course of the cause a question was made as to the time from which the annuity was to commence; and that question now came on to be argued.

Mr. *Pemberton* for the defendants:—An annuity given by will does not become payable until the end of a year after the testator's death. In *Gibson v. Bott*, (a) the Lord Chancellor says: "If an annuity is given, the first payment is paid at the end of the year from the death." The same point came on

[\*391] \*again before the Lord Chancellor in *Fearn v. Young*, (b) in which case the Lord Chancellor states, that it was not very well settled whether the tenant for life was entitled to interest from the death, or from a

(a) 7 Ves. 89.

(b) 9 Ves. 549. See p. 553.

ties, and the probable interest must be considered.' And (10 Ves. 535) 'whenever the subject, to be administered is trust property, and the objects, for whose benefit it is to be administered, are to be found in a will, not expressly creating a trust, the indefinite nature and *quantum* of the subject, and the indefinite nature of the objects, are always used by the court as evidence, that the mind of the testator was not to create a trust; and the difficulty that would be imposed upon the court to say what should be so applied, or to what objects, has been the foundation of the argument that no trust was intended;' or as Lord Eldon expresses it in another case, (Turn. & Russ. 159) 'where a trust is to be raised characterized by certainty, the very difficulty of doing it is an argument which goes, to a certain extent, towards inducing the court to say, it is not sufficiently clear what the testator intended.' I must admit, that in the endeavor to apply these rules and principles to the present case, I have found very great difficulty; that in the repeated consideration which I have given to the subject, I have found myself at different times, inclined to adopt different conclusions; and that the result to which I have finally arrived has been attended with much doubt and hesitation." His lordship, after a minute examination of the facts of the case, concludes in these words; "On the whole I am under the necessity of saying, that for the creation of a trust, which ought to be characterized by certainty, there is not sufficient clearness to make it certain that the words of trust were intended to be imperative, or to make it certain what was precisely the subject intended to be affected, or to make it certain what were the interests to be enjoyed by the objects. It appears to me, therefore, that the plaintiffs have not made out any title, and that the bill ought to be dismissed. Bill dismissed without costs."

1823.—*Hoskins v. Lloyd.*

year afterwards ; but that, at that time, the opinion of several of the masters was, that it was not to be paid until two years. Your honor decided the point in *Stott v. Hollingworth* ;(c) and from what your honor says in the beginning of your judgment in *Storer v. Prestage*,(d) it must be inferred, that unless there are express directions for the commencement of the annuity, it is not to commence until the end of one year after the testator's death.

Mr. *Heald*, and Mr. *Swanston*, for the plaintiffs :—There is something in the report of *Fearns v. Young* which did not fall from the Lord Chancellor ; for his lordship is made to say, that an annuitant is no more than tenant for life. But the contrary was decided in *Bayley v. Bishop*.(e) There it was held that the direction to lay out 500*l.* in the purchase of an annuity for the life of the testator's son, was a gift of the 500*l.* ; and that, upon a bill filed, he might have received the money, and the court would not have compelled the trustees to lay it out in the purchase of an annuity. The cases cited on the other side are cases of annuities charged upon the residue ; but here the annuity is prior to the residue. The expressions of the will manifest an intention of immediate payment. The direction that the annuity is to be paid by monthly payments, means \*that the annuitant is to receive the first [\*392] payment at the end of the first month after the testator's death ; and it is impossible that the testator could mean that the first payment was to be deferred until the end of thirteen months after the testator's decease.

Mr. *Pemberton*, in reply, said, that there was no difference between an annuity and a legacy ; for that it was as difficult to provide a fund for the payment of an annuity as it was for the payment of a legacy.

The VICE-CHANCELLOR :—As a will speaks at the death of a testator, it must be intended that the payment of an annual sum given by it is to commence from that period, unless there be some circumstances or expression in the will to control that intention. In this will there is no such circumstance or expression ; and I am, therefore, of opinion, that the payment of this annuity ought to commence from the testator's death.

\**HOSKINS v. LLOYD.*

[\*393]

1823, 6th June.—*Practice.—Contempt.*

Where a defendant is in contempt for want of an answer, and afterwards files it, if the plaintiff acts on the answer he waives the contempt and the defendant need not obtain an order to discharge it.

THE defendant being in contempt for want of answer, filed his answer, but did not get the order to clear his contempt. The plaintiff afterwards moved for the production of deeds upon an admission in the answer. And subse-

(c) 3 Madd. 161. ✓

(d) *Ibid.* 167.

(e) 9 Ves. 6.

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1823.—The Attorney General v. The Earl of Ashburnham.

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quently the defendant obtained an order to dismiss the bill for want of prosecution.

A motion was now made on the part of the plaintiff to discharge the order for dismissing the bill, on the ground of irregularity, because it had been obtained before the defendant had obtained an order to clear his contempt.

Mr. Agar, for the motion, cited *Green v. Thomson* (a).

Mr. Tinney, for the defendant, opposed the motion, and cited *Anon.* (b) *Const v. Ebers*, (c) and *Smith v. Blofield*, (d) insisting that the contempt had been waived by the plaintiff moving upon the answer. But he offered to submit to the order now sought, on the terms of the plaintiff paying all the costs of the motion to dismiss the bill, and of the present motion.

The VICE-CHANCELLOR :—A defendant who puts in his answer may be discharged of his contempt, either by the usual order, or by the waiver of the plaintiff. Here he did not obtain the usual order; but the plaintiff, by excepting and acting upon the answer, waived the contempt.[1]

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[\*394] \*THE ATTORNEY GENERAL v. THE EARL OF ASHBURNHAM.

1823, 7th June.—Costs.—Charity.

{ Where a charity information is filed under 59 Geo. 3, c. 91, without a relator, the court has jurisdiction to order the defendant to pay the attorney general his costs.

{ THIS was a charity information filed by the attorney general, without naming any relator, under the 59 G. 3, c. 91, s. 1; and the question was, whether the court had any jurisdiction to order the defendant to pay the attorney general his costs.

The *Attorney General*, and Mr. *Pemberton*, for the crown :—Where the informations are filed on behalf of charities, the attorney general sues at the instance of other parties; and whenever that is the case costs are given to the crown; and where the attorney general is defendant the practice is to make the plaintiff pay him his costs. This act only substituted another remedy for charities, in lieu of the former, in which the court could give costs. If the court has not that power, every person whose conduct is attacked would defend it, as he would not be liable to costs. This act was only intended to apply a new and additional remedy; and therefore, as it says nothing about costs, but leaves the conduct and decision of the suit the same as before, it leaves the discretion as to costs in the same situation. The rule

(a) *Ante*, 121.

(b) 15 Ves. 174.

(c) 1 Madd. 530.

(d) 2 V. & B. 100.

[1] By proceeding in the cause, the plaintiff waives the want of an affidavit to the answer. *Nesbett v. Dellar*, 7 Gill & Johns. 494. So the defendant by proceeding, waives an order on the plaintiff for security for costs. *Hay v. Power*, *Edw.* 494.

that the attorney general neither receives nor pays costs, applies only to suits respecting any debt or interest of the crown. Here he does not sue for any interest of the crown. When the act says: "that it shall be lawful for the court to proceed in hearing and deciding the suit, according to the due course of the court," it means the due course of the court in cases \*instituted before the passing of the act. The principle upon which a [\*395] relator is named is not for the purpose of charging the defendants with costs, but to enable them to receive costs. The object of the act was to prevent any proceedings being commenced for the purpose of harassing individuals. It would be an extraordinary interpretation to say that this statute was passed, not to reform abuses, but to screen delinquents from the consequences of misconduct.

Mr. *Wingfield*, for the trustees.

Mr. *Sugden*, and Mr. *Sidebottom*, for the defendant:—The king neither pays nor receives costs. The reason given for this is, that as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them. (a) The obligation to pay, and the right to receive costs, must be co-existent; and if the attorney general, as is admitted on the other side, does not pay costs he cannot be entitled to receive them. The case mentioned by Mr. Beames (b) has been decided, and no costs were given to the crown, though it was decided in favor of the crown. The object of this act was to allow the attorney general to apply to the court by petition; and the other mode was inserted only to prevent its being inferred that the former course was prohibited. But when the attorney general does proceed by information he must proceed in the same manner as he did before the passing of the act. No case can be produced in which the attorney general has received costs.

The *Attorney General* in reply:—If collusion is suspected between [\*396] the defendants and the relators, the attorney general is served with notices to attend the inquiries before the master; he attends by a distinct solicitor, and always receives his costs. It does not follow that the crown cannot receive costs, because it does not pay them. The practice of introducing relators was established because as the crown might receive, but did not pay costs, there might be some person liable to them. It is every day's practice in the court of exchequer for the crown to receive costs in cases of interlocutory applications, which are refused as being frivolous. In a late case the defendant applied for further time to put in a further answer, and the court gave the attorney general his costs.

The *VICE-CHANCELLOR*:—Before the passing of the statute in question, it was the settled practice of this court that the attorney general could not proceed in an information respecting a charity, without naming a relator, who might be answerable in costs to the defendants. Upon these informations in matters of charity, where the merits of the case required it, the constant habit of the court

(a) 3 Black. Com. 400.

(b) Beames on costs, 83, note 2.



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was to subject the defendant to all the costs of the proceeding. And if this new act, (which, for the purpose of giving additional facilities to suits of this nature, enables the attorney general to file his information without the intervention of a relator,) should have the effect of relieving the defendant from costs to which he was before liable, it would certainly be some surprise upon the intentions of the legislature. It is said that, although this result [\*397] may not have been \*in the contemplation of the legislature, it is the necessary consequence of a general principle, that the crown can neither pay nor receive costs. I find no such general principle in courts of equity. The attorney general constantly receives costs, where he is made a defendant in respect of legacies given to charities;(c) and, even where he is made a defendant in respect of the immediate rights of the crown in cases of intestacy. And where charity-informations have been filed by the attorney general, costs have been frequently awarded him in interlocutory matters, independently of the relator. And this supposed general principle which is asserted by the defendants, is not maintained by any decision, or by any dictum, which appears in any reported case. Collecting the law of the court, in this case as in others, from its practice, I am of opinion, that although the attorney general, suing in discharge of his public duty, could never be made to pay costs in a court of equity, and that he was, therefore, obliged to name a relator in matters of charity, yet it is not the rule of a court of equity that he cannot receive costs, and that the defendant must, in this case, pay his costs.

It is hardly necessary to notice the reference that has been made to the case of costs in a court of law. In those courts, costs, *eo nomine*, were unknown to the common law, and were recovered only by increased damages. The statute of Gloucester,(d) which first gave costs expressly, did not extend to the king, because he was not specially named; but it was expressly provided by the 33d H. 8, c. 9, that the king shall recover his debt with costs.

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[\*398] \*GREEN and others v. FOLGHAM and others.

1823, 10th June.

The sole possessor of a recipe for making a medicine, assigned it, on the marriage of his daughter, to trustees, in trust for her and her husband, for their lives; and directed that after their decease it should be sold for the benefit of their children. The mother destroyed the recipe, and verbally communicated the contents to her eldest son, for the benefit of his brothers and sisters. Upon a bill filed against him by some of the younger children, he was declared to hold the secret upon the trusts of the settlement, and was decreed to account for the profits made by him by the sale of the medicine after his mother's death; and, as a sale was impracticable, an issue was directed to ascertain the value of the secret.

In 1791 William Singleton was possessed of a recipe for making an ointment called "Dr. Johnson's ointment for the eyes," the contents of which

(c) See *Moggridge v. Thackwell*, 7 Ves. 88.

(d) 6 Edw. I. c. 1

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were known only to himself; and in the month of September in that year, upon the treaty for the marriage of his daughter Selina with Timothy Folgham, it was agreed that the ownership of the ointment, and the recipe, should be settled, after the decease of Singleton and his wife, for the benefit of Folgham and his intended wife, and their issue, in the manner after mentioned. Accordingly, by an indenture dated the 12th of September 1794, and made between Mr. and Mrs. Singleton of the first part, Mr. and Mrs. Folgham of the second part, and three trustees, of whom the defendant Church was the survivor, of the third part, in pursuance of the agreement, and in consideration of the marriage which had then lately taken place, Singleton assigned to the trustees the proprietorship of the medicine, upon trust for Singleton and his wife, during their lives, and the life of the survivor of them; and after the survivor's decease, upon trust for Selina Folgham, for her life, for her separate use; and after her decease, upon trust for Folgham for his life; and it was declared, that if at the decease of the survivor of these four persons there should be more than one child of Folgham and his wife, the trustees should sell the ownership of the ointment, and the money arising from the sale should be laid out by the trustees in their \*names, on government [\*399] or real securities, for the benefit of such children, in equal shares, and to be transferred to them at the usual periods. And Mr. and Mrs. Folgham covenanted, that if any of their children should survive them, they should discover to one or more of them the method of making the ointment.

Mr. Singleton survived his wife and Mr. Folgham; and on his death the recipe was delivered to Mrs. Folgham. She, assisted by the defendant, William Singleton Folgham, one of her sons, made and vended the ointment until about six months before her death; when, having previously communicated to him verbally the secret of making the ointment, she retired into the country, and left him in the entire management of the concern. In Jan. 1816 Mrs. Folgham died, leaving issue the plaintiff, Selina Elizabeth Green, (who afterwards married the plaintiff Stephen Green,) the defendant William Singleton Folgham, and three other children, all of whom were then infants. The recipe was not found after Mrs. Folgham's death, and it was therefore believed that she had destroyed it. In March 1816, William Singleton Folgham came of age; when Church, the surviving trustee, conceiving that it would be more beneficial to the parties interested, that W. S. Folgham should make up and vend the ointment according to his mother's instructions, for the benefit of himself and his brothers and sisters, than that the secret should be sold, an indenture, dated the 22d day of June 1816, was made between W. S. Folgham of the one part, and Church, and one Hall, of the other part; by which, after reciting that the secret of making the ointment had been communicated to W. S. Folgham by his mother, for the benefit of himself and his brothers and sisters, W. S. Folgham covenanted to make up and sell \*the ointment, and twice in every year to pay to Church and [\*400] Hall four fifths of the clear profits, after deducting 25℥ per cent,

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yearly from the gross amount of the sales, for his trouble. And it was declared that Church and Hall should stand possessed of the four fifths of the profits, in trust for Mr. and Mrs. Folgham's other children.

W. S. Folgham made up and sold the ointment, and disposed of the profits according to the provisions of this deed. In March 1817, Mrs. Green came of age; and on the 17th of September in that year, she, at W. S. Folgham's request, signed an agreement to transfer to him all her interest in the ointment, in consideration of his paying an annuity of 100*l.* to her, and to the plaintiff Stephen Green (to whom she was then about to be married) for their lives; and on the 22d of the same month she also, at W. S. Folgham's request, executed a deed poll confirming the indenture of the 22d of June 1816.

The bill did not take any notice of the recital before mentioned in the indenture of June 1816; but it charged that the provisions made by that indenture for the plaintiff Mrs. Green, and the other younger children whilst they were under age, was very disadvantageous to them: that Church and Hall acted in concert together, and had imposed upon them in respect of the provisions of that deed: that Mrs. Green was imposed upon by W. S. Folgham in respect of the deed poll of September 1817: that she was ignorant of its contents when she executed it; that it was obtained from her by fraud: that

the annuity of 100*l.* a year was a grossly inadequate consideration [\*401] for the share of the profits of the ointment to which she was \*entitled under the settlement: that W. S. Folgham held the proprietorship of the ointment subject to the trusts of the settlement: that those trusts ought to be performed, and the ownership of the ointment sold, as directed by that instrument.

The bill prayed, that the deeds of June, 1816, and September, 1817, and the agreement, might be declared fraudulent and void, and be delivered up to be cancelled: that the trusts of the settlement of September, 1794, might be performed: that an account might be taken of the quantities of the ointment sold since Mrs. Folgham's death, and of the moneys produced by the sale: that one fifth of the profits might be paid to the trustees of Mr. and Mrs. Green's marriage settlement, and three fifths be placed out at interest for the benefit of the three other younger children: that the ownership of the ointment might be sold, and the proceeds applied according to the trusts of the settlement; and that W. S. Folgham might be restrained from divulging the method of preparing the ointment.

W. S. Folgham, by his answer, said, that the existence of the settlement was not known to him until long after he had been in possession of the secret of preparing the ointment: that his mother communicated the secret to him without imposing any conditions on him, or stating that any other person was to partake of the profits of the ointment; and he submitted whether, under these circumstances, his brothers and sisters took any interest in the ownership of the ointment under the trusts of the settlement, and whether he

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was bound by the provisions thereof. He admitted that he came of age on the 20th of March, 1816; and that, \*having become acquainted with the contents of the settlement, he was desirous that his brothers and sisters should partake of the profits of the ointment; and that he accordingly executed the indenture of June, 1816; and he submitted that that deed, having been made for the interest of all the infants, ought not to be disturbed. He said that he had devoted his whole time and attention to the conduct of the business, and was brought up with the full expectation of having the profits for his provision; and that, in order to assist his mother in the business, he had given up a situation which he had filled for five years; and that, in the course of conducting the business, he had been obliged to forego many advantageous opportunities of advancement in other pursuits; and he denied all the allegations in the bill as to the deed-poll and agreement having been obtained from Mrs. Green by fraud or surprise, and as to the annuity of 100*l.* being an inadequate consideration for her share of the profits of the ointment.

The cause now came on to be heard on the bill and answer.

Mr. *Hart*, and Mr. *Girdlestone*, for the plaintiffs:—The communication of the secret by the mother to the defendant W. S. Folgham was a breach of trust; and, as he gave no consideration for the secret, he must be considered as holding it subject to the trusts of the settlement. At all events he is precluded, by the recital in the indenture of June, 1816, from saying that the secret was disclosed to him for his own benefit. It is impossible that the deed of 1816, can be supported, as the trustees had no authority to make the arrangement which it was the object of that deed to carry into effect.

\*Mr. *Horne*, and Mr. *Knight*, for the defendant W. S. Folgham:— [\*403] The argument in this case divides itself into two heads: first, whether this secret is property on which the court can act; and, secondly, whether it was not communicated under such circumstances as to prevent the court from acting, except under the deed of 1816, by which W. S. Folgham is willing to be bound.

1st. This is a mere verbal secret; it was never committed to writing. Now can the court perform a trust which is fastened upon a substance so shadowy as this? It never can be ascertained whether the secret disclosed is or is not the real secret. There can be no property in a subject of this nature. *Newbery v. James*,<sup>(a)</sup> *Williams v. Williams*.<sup>(b)</sup> Nor is even the exclusive enjoyment of it protected by patent. No such relief as is sought by the bill can be granted; for the plaintiffs, in fact, pray for a specific performance of the original settlement.

(a) 2 Mer. 446.

(b) 3 Mer. 157. But see *Yovatt v. Winyard*, 1 J. & W. 394; and *Bryson v. Whitehead*, ante, 74.

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2d. This secret, which the parties attempted to make the subject of a settlement, is revealed to a person ignorant of the trusts of that settlement; and the question is, whether a person coming to the knowledge of a secret under such circumstances does not take it in such a manner as not to subject him to any trust? The question whether he is a trustee, does not depend upon his being the depositary of the secret; but whether it was revealed to him under such circumstances as, if a bill had been filed against him, he would have [\*404] been declared a trustee. The communication was \*made to him by his mother, under no trust. He made no promise, at the time, that he would hold it for the benefit of his brothers and sisters. If the secret was originally disclosed without any trust, can this court now affect his conscience? Unless he originally took it as a trustee, nothing that occurred subsequently can make him a trustee. When the settlement was discovered no new equity arose. Because it was a breach of trust in the mother to disclose the art of making this ointment, it does not follow that a trust was fixed on the person to whom it was disclosed. Suppose this defendant had communicated the secret to another person, it would not have been a breach of trust in him, and he could not have been restrained from revealing it; and if he could not have been restrained from revealing it, what is there in this court to compel him to reveal it for the benefit of the plaintiffs? Besides, W. S. Folgham did give a valuable consideration for the secret; for he swears, in his answer, that he gave up a very lucrative situation for it. We then come to the deed of 1816: W. S. Folgham submits to it, and is willing to be bound by it. But the plaintiffs, at one time, repudiate that deed, and, at another, insist upon it, and claim the benefit of the recital. But as admissions made pending a compromise are not the subjects of evidence, so an admission made upon a family agreement cannot be taken advantage of against the party making it. Can a party who seeks to set aside a deed of family compromise take advantage of such an admission as an estoppel, and then set aside the deed upon which that estoppel arises? He cannot destroy the deed, and then take advantage of it. Besides, the facts stated on the record contradict that recital; and if the plaintiffs had not set their cause down on bill and [\*405] answer, but had filed a replication \*we could have produced evidence to explain away that recital, which we are now precluded from doing by their not adopting that course. What benefit will they derive from avoiding the deed? For if the deed is declared void, their situation will be the same it was before the deed was executed.

Mr. *Merivale*, for the defendant, Maria Folgham:—The arrangement made by the deed in 1816 was extremely beneficial to my client, and her interests will be greatly prejudiced if that deed is set aside. The decree sought by this bill is one which the court could not enforce. The bill prays that the ownership of this ointment may be sold. Now, supposing the court were to decree a sale, how could it enforce it? What are the acts which W. S. Folgham is

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to do, in order to give effect to the sale; and how is the court to compel him to do those acts? The Lord Chancellor has decided that it is impossible to enforce the negative,<sup>(c)</sup> and it is much more difficult to enforce the affirmative.

*Mr. Bell, and Mr. Pepys, for the trustees.*

The VICE-CHANCELLOR :—It was stated, at the bar, that the defendant, W. S. Folgham, was a purchaser of this secret for a valuable consideration, without notice of the settlement; but no such case is made in his answer. And, after the admission made by him in his answer that he voluntarily considered himself as a trustee for the marriage settlement, and after the execution of the deed of \*June 1816, which is not impeached, he cannot [\*406] successfully assert a personal title to this secret.

By the terms of the marriage settlement the trustees were directed to sell this secret upon the death of Selina Folgham; and, having no authority to deal with this subject as they have in fact dealt with it by the deed of June 1816, that deed is merely void against the younger children, who were all then infants. The subsequent agreement of September 1817, by which Selina Green engaged to assign her interest in the secret to the defendant for the annuity therein stated, being abandoned at the bar, is now out of the question. The defendant, W. S. Folgham, being to be considered therefore as a trustee of this secret under the settlement, the first relief to which the plaintiffs are entitled is, that he should come to an account for the profits actually made by him since the death of his mother, from the sale of the ointment, having a reasonable allowance made to him for his time and trouble in preparing and vending the same. If this secret could be made a subject of sale, the plaintiffs would be next entitled to ask from the court that a sale should be directed accordingly. But, inasmuch as the court has no possible means either to communicate this secret to a purchaser with certainty, or to protect him in the enjoyment of it, a sale becomes impracticable. But although the court can not direct a sale, it has the power of taking a course which, in point of advantage, will be equivalent to the plaintiffs. It can inquire what would be the value of this secret to sell, provided it could be made the subject of sale; and the annual profits which have actually been made by the sale of the ointment from the death of the mother will be a fair criterion by which that value may be estimated.

\*I think that this value is more fit for the consideration of a jury than [\*407] of the master; and, after decreeing the account of the profits from the death of the mother, in the manner which I have stated, I shall direct the parties to proceed to an issue at law, in order to try what, at the date of this decree, was the pecuniary value of the secret for the preparation of the ointment in the pleadings mentioned, called, "Dr. Johnson's ointment for the eyes, or the golden ointment." The circumstances, that the plaintiff Selina Green's interest

(c) In *Newbery v. Jones*, and *Williams v. Williams*, before cited.

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in the secret is made the subject of her marriage settlement, and that one or more of Mrs. Folgham's children are still infants, are not material for present consideration.

Let further directions and costs be reserved.

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DECREE IN GREEN v. FOLGHAM.

This court doth order and decree, that it be referred to Mr. Cross, one of the masters of this court, to take an account of the money received by the defendant, W. S. Folgham, or by any person or persons by his order, or for his use, in respect of the sales of the ointment, or medical preparation, called, &c. since the death of Selina Folgham, in the pleadings named; and also an account of his charges and expenses in the preparation and sale of the said ointment; and in taking the said account the master is to consider what would be a reasonable compensation to the defendant, W. S. Folgham, in respect of the preparation and sale of the said ointment: And it is ordered, that the said master do take an account of the payments which have been made by the said W. S. Folgham to or for the use of his brothers and sisters respectively, since the death of the said Selina Folgham; and for the better taking such accounts, the parties are to produce, upon oath, all books, papers, &c. and are to be examined on interrogatories, &c.; And it is ordered, that the parties do proceed to a trial at law in his majesty's court of common pleas, at the sittings after next Michaelmas term on an issue to try what is, on the 28th day of June 1823, the value to the defendant, W. S. Folgham, of the recipe for, or the art or method of preparing the said ointment; and in such issue the said plaintiffs are to be the plaintiffs at law, and the said W. S.

Folgham is to be defendant at law, who is for with to name an attorney, accept a declaration, appear and plead to issue; and it is ordered, that the said master do settle the issue in case the parties differ. And this court doth reserve the consideration of all further directions, and of the costs of this suit, until after the said master shall have made his report, and the trial of the said issue; and any of the parties are to be at liberty to apply to this court as there shall be occasion.

Reg. Lib. 1822, A. fol. 2338.

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KIRKPATRICK and another v. DENNETT.

1823, 11th June.—*Jurisdiction.*

A general demurrer to a bill by the assignees of a bankrupt, to restrain an action by him to try the validity of the commission, allowed.

THE defendant had been found a bankrupt under a commission issued in October 1810. The plaintiffs were his assignees. The question was, whether the filing of a bill for an injunction was the proper course to be adopted by them to prevent the bankrupt from proceeding in an action which he had commenced in order to try the validity of his commission.

The defendant had submitted to the commission and obtained his certificate in January 1819. He took no step to impeach it until he brought the action. But in April 1819, the defendant's son, in collusion, as the bill alleged, with the defendant, presented a petition for the purpose of superseding the commission, on the following grounds: that the petitioning creditor's debt was usurious: that the commission was obtained by collusion between the defendant and the

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petitioning creditor ; and that there was no evidence of an act of bankruptcy. On the 27th April 1819 this petition was dismissed.

The plaintiffs had entered into several contracts for the sale of the bankrupt's estates. But these contracts \*were not completed, in con- [\*409] sequence, as the bill stated, of his having declared his intention of disputing the commission ; and, in Trinity term 1822, an action was brought by him against the plaintiffs for that purpose.

The bill, after stating these facts, prayed that it might be declared that the defendant had submitted to and acknowledged the validity of the commission ; and that he might be perpetually enjoined from proceeding in the action, and from all other proceedings to impeach or supersede the commission.

To this bill the defendant filed a demurrer, for want of equity.

Mr. *Treslove*, for the defendant :—The case of *Flower v. Herbert(a)* is the only one in which a bill like this has been entertained. I have looked at that case in the registrar's book, and I find that the bankrupt had there delayed to bring his action until the assignees were about to declare a dividend. That is not the case here : for these plaintiffs have done nothing under the commission. There too the petitioning creditor's debt arose on account ; and Lord Hardwicke said, that he did not know how it could be determined without taking that account, which could not be taken in an action at law ; and he granted the injunction till the hearing of the cause. The difference between that case and this is, that the petition in 1819 represented the commission as founded on a usurious debt, and that the assignees have advertised the estate for sale in lots, and entered into contracts for sale ; and that those contracts are not completed \*on account of the bankrupt disputing the commission. [\*410] Therefore it is quite evident that those questions must be decided at law. Here the action was brought in Trinity term 1822, and the plaintiffs have waited until the defendant was on the point of trying it, and then they have filed this bill. This is not a case in which the court, even if it has jurisdiction, ought to interfere under the authority of the case decided by Lord Hardwicke. But the court has no jurisdiction to interfere in this case. The proper course would have been for the plaintiffs to present a petition, and not to have taken a course which is attended with great delay and expense.

Mr. *Bell* and Mr. *Wakefield*, for the plaintiffs :—The question is not so much whether this bill can be maintained, as whether, if a bankrupt avails himself of the benefit of his commission, and takes his certificate, and protects himself under it, and thereby adopts it, he can be allowed to bring an action at law to dispute the commission. The objection to this bill is founded on the want of jurisdiction in this court to entertain this suit, and not on any ground of equity. That objection cannot be taken by way of general demurrer.

The VICE-CHANCELLOR :—The bill does not allege that the commission is a valid one, or that the bankrupt brings the action only with a view to harass



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1823.—*Davis v Getty and others.*


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his assignees. The sole ground on which the bill rests is, that the bankrupt has obtained his certificate; and the question raised upon the bill is, whether that is a sufficient reason for restraining a bankrupt from all proceeding to dispute his commission, whatever may be the nature of his objection, or however late he may have discovered it.

[\*411] \*The objection as to the jurisdiction was not taken in the case referred to. The proper and familiar course to obtain the object of this suit is by petition,[1] and if this bill would lie, a bill in the court of exchequer would also lie; and bankruptcy would thus come indirectly to be administered in that court.

Independently, however, of the question of jurisdiction, I shall allow this demurrer, upon the ground that the bill does not state a case which entitles the assignees to the injunction.

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DAVIS V. GETTY and others.

1823, 13th and 28th June.—*Award.*

Where it is one of the terms of an agreement to refer disputes to arbitration, that the submission shall be made a rule of a court of common law if either party require it, this court has no jurisdiction to relieve against the award, although the submission has not been made a rule of the court of common law within the time limited by the statute.

THE plaintiff, and the defendant Mary Getty, having disputes with each other, agreed that they should be referred to arbitration, and that the submission should be made a rule of the court of common pleas if either party required it. The award made in pursuance of this agreement directed the plaintiff to pay a certain sum of money to the defendant; but neither the submission nor the award was made a rule of court.

The object of the bill was to prevent the defendant from availing herself of the award: and, upon a motion, made by the plaintiff, to restrain a proceeding taken by the defendant with that view,

Mr. Agar, and Mr. Duckworth, for the defendant, objected, that, as it had been agreed between the parties, that the submission to arbitration [\*412] should be made a rule of the court of common pleas, this court had \*no jurisdiction to relieve the plaintiff from the effect of the award.

Mr. Hart, and Mr. Garratt, for the plaintiff:—This court is not deprived of its jurisdiction over the subject matter of this suit; for the submission to arbitration has never been made a rule of the court of common pleas. It is plain, from the language of the 1st sect. of 9th and 10th W. 3, c. 15, that the legislature did not mean to transfer the jurisdiction over awards. It only meant to give either party the privilege of making it a rule of court if he

[1] Vide *Marriott v. White*, ante, 20, note.

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pleased; not to compel him to do so; but to leave him at liberty to enforce the award by an action, if he preferred that course. In *Guinnett v. Bannister*, (a) the submission had actually been made a rule of a court of law. In *Steff v. Andrews*, (b) the Vice-Chancellor observes: "If made a rule of court, this court could not act. The jurisdiction would be transferred to the court in which the submission was made a rule. But if the submission is not acted upon, no other court acquires jurisdiction, for no process of contempt lies. It is the same as if no such submission had been made." And his honor therefore overruled the plea. That case is completely in point. *Goodman v. Sayers* (c) gives countenance to the same principle. For if the master of the rolls had thought that he had no jurisdiction, he would not have entered into the facts of the case in delivering his judgment. If a party does not choose to enforce the award by attachment, but brings an action, he will not afterwards be allowed to waive his action, and proceed by attachment. (d) Therefore as the defendant \*has taken a proceed- [\*413] ing to enforce the award, she has abandoned the jurisdiction, and can no longer make the submission a rule of court. Suppose a reference was obtained by fraud, and that an award was made, and an action brought upon it, and that the defendant pleaded the fraud, (which would give him a legal defence to the action,) would a court of equity say that he could not come to it for a discovery as to the fraud? The language of the act is not that no other court shall have jurisdiction, but that no other court shall stop the process.

The construction which the Lord Chancellor has put upon the last section of this act is, that no other court shall set aside the award except that of which the submission is made a rule. (e) So that the whole purview of the act looks to its being made a rule of the court. The effect of the statute is, that if the submission is made a rule of court, then that court obtains the jurisdiction, which is given it by the second section, to set the award aside, and also the jurisdiction given it by the first section to enforce the award. We submit, therefore, upon the language of the act, and upon the authorities which have been cited, and particularly *Steff v. Andrews*, that, as this award has not been made, and cannot now be made a rule of court by the other party we have a right to apply to this court for relief.

The VICE-CHANCELLOR:—The statute of W. 3, for determining differences by arbitration, had two objects: first, to give the parties the process of contempt for enforcing the award; and next, to make awards final, unless complaint was made \*within a limited time, in that court [\*414 to which the parties had agreed to give jurisdiction, by consenting that the submission should be made a rule of it. The statute limits no time within which the party who seeks to enforce the reward is to make his application to the court for that purpose; but the party who seeks to set aside the award is

(a) 14 Ves. 530.

(b) 2 Madd. 6.

(c) 2 J. & W. 219.

(d) *Badley v. Loveday*, 1 Bos. & Pull. 81.

(e) 14 Ves. 531.

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 1823.—*Williams v. Bacon and others.*


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to make his application to the court before the last day of the next term after the award is made. The court, however, has no jurisdiction either to enforce the award or to set it aside, until the submission be actually made a rule of the court. Either party may make the submission a rule of the court, and may obtain the aid of the court, either to enforce or avoid the award, by taking, in due time, that preliminary step. The argument for the plaintiff admits that, if he had taken that preliminary step in due time, this court would have had no jurisdiction. But it is contended for him that, because he failed to take that step, not only is the jurisdiction transferred to this court, but he is relieved from all limitation as to the time within which he is to make his complaint against the award. I can not consider that it was the intention of the legislature to leave it to a party who meant to complain of the award to escape, at his pleasure, from the provisions of the statute. I consider it to be the duty of a party who means to complain of the award, to make the submission a rule, so as to give the proper court jurisdiction; and that, if he fail to do this in due time, he can not by his own default, create a new jurisdiction in this court, and defeat the limitation of time fixed by the statute.[1]

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\**WILLIAMS v. BACON and others.*1823, 13th June.—*Tithes.*

At the trial of an issue to ascertain whether one of the defendants, a layman, was entitled to the tithes, or a modus in lieu of the tithes, of certain lands, it was proved that a payment, described as a tithe or rate-tithe, issuing out of the lands in question, have been conveyed by the defendant's title-deeds for the last 150 years, and that this payment had been received by him and his ancestors, and that no tithe had been paid to the plaintiff, the rector, within living memory; and a verdict was found for the defendant.

A motion for a new trial by the rector, was refused.

THE bill was filed by the rector of the parish of Markfield, against the occupiers of certain lands in that parish, and against Charles March Philipps, Esq. and it prayed for an account, and payment of the tithes of those lands.

The occupiers in their answer stated, that the lordship of Markfield consisted partly of ancient inclosed lands, consisting of 116 acres, or thereabouts, lying together, and called and well known by the name of the Cliff Slade. They then set forth the boundaries of these 116 acres, and added that, during the several years mentioned in the bill, the occupiers of the lands called the Cliff

[1] This, and the subsequent case of *Dawson v. Sadler*, post. 537, are reviewed by Walworth Ch. in *Toppan v. Heuth*, 1 Paige, 293, who subscribes to the doctrine of the text; hinting however, that an extreme case might arise, in which chancery would interfere. Vide *Nichols v. Roc*, 5 Sim. 156. S. C. 3 Mylne & Keene, 431. *Bloomer v. Sherman*, 5 Paige, 575.

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Slade had paid to the defendant Phillippa the yearly sum of 4s. 10d. and that the same had been accepted by him in lieu of the tithes of those lands.

The defendant Phillippa, by his answer, claimed the tithes in kind of the lands in question, or a modus, composition, rate-tithe, or annual payment of 4s. 10d. in lieu thereof; and he said, that the said portion of tithes, modus, composition, rate-tithe, or annual payment, had been, for a great length of time, the subject of conveyances and assurances in the law as a lay fee; and that the persons from whom he derived his title to it had, for 140 years and upwards, received the tithes of the lands called the Cliff Slade, or accepted a composition, rate-tithe, or yearly sum, in lieu and satisfaction thereof.

\*At the hearing of the cause, the following issue was directed to be [\*416] tried at the next assizes: "whether the defendant, C. M. Phillippa, was entitled to the tithes, or to a modus of 4s. 10d. payable yearly in lieu of tithes, of the lands called the Cliff Slade?"

At the trial of the issue Mr. Phillippa produced his title deeds for the last 150 years, by some of which was conveyed, "all that rate tithe of 4s. yearly renewing, increasing and arising out of certain grounds in Markfield, called the Cliff Slade;" in others, "the tithes or rate-tithes of 4s. 8d. yearly issuing out of the closes called the Cliff Slade, in the parish of Markfield;" and in others, "the tithes or rate-tithes of 4s. 10d. issuing and payable out of sundry closes called Cliff Slades, situate and being in Marksfield aforesaid." It was also proved that, as far as living memory could reach, this payment had been received by Mr. Phillippa and his ancestors, and that no tithes had been paid to the rector for the lands in question. Upon this evidence the jury found a verdict for the defendants in this court, who were plaintiffs in the court of law.

Mr. Bell, and Mr. Treslove, for the plaintiff, now moved for a new trial.

The question is, whether, in the case of an ecclesiastical rector, a court ought, upon such evidence as was given at the trial of this issue, to direct a jury to find in favor of the defendants; or whether there ought not first to be some evidence of the existence of such a portion of tithes, and how it became separated from the rectory? Until the dissolution of monasteries no layman could hold tithes. When the monasteries were dissolved the crown was enabled to grant out \*tithes to any individual. But it must be [\*417] shown that this pension was existing at that time, and also how it became separated from the monastery. Evidence ought to have been given of the commencement of this payment, as is required in the case of a composition real. The defendants did not make any attempt to show the origin of their title; they only showed a dry possession for 140 years. The introduction of this payment into the title-deeds can not prejudice the rector; for he had no access to them. Admitting that where tithes have been the subject of conveyance and enjoyment for a great length of time, a title would be presumed against a lay impropriator, the same circumstances would not induce the court to make the same presumption against an ecclesiastical rector; for

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a lay impropriator may alienate, but a spiritual rector cannot: and the courts look with great jealousy upon any usurpation of the rights of the church. *Strutt v. Baker*,<sup>(a)</sup> *Scott v. Airey*,<sup>(b)</sup> *Funshaw v. Rotherham*,<sup>(c)</sup> *Berney v. Harvey*,<sup>(d)</sup> and *Meade v. Norbury*.<sup>(e)</sup>

Mr. Heald, and Mr. Merivale, for the defendants.

The VICE-CHANCELLOR:—This case cannot be confounded with a prescription in *non decimando*, which is merely unlawful. The defendant here claims a portion of tithes to which he may be legally entitled; and the single consideration is, whether there was sufficient evidence before the jury [\*418] \*to justify their presumption that he had such legal title.

It is proved, by existing deeds, that this portion of tithes has been the regular subject of conveyance for one hundred and fifty years past; and that the actual perception of tithes, or of a money payment in lieu of tithes, has accompanied the title by conveyance as far back as living testimony can reach; and, unless it be peculiar to this species of property that the origin of the title must be actually shown, no evidence can be more conclusive. It is argued, that this would be good evidence against a lay rector, according to the case of *Scott v. Airey*, and the other cases referred to; but that it is not sufficient evidence against the plaintiff, who is a spiritual rector. I cannot very well reach the principle of this distinction. A legal title to a portion of tithes may exist as well against a spiritual rector as against a lay impropriator; and why, therefore, is not such a title to be presumed from long conveyance and possession? It is true that a lay impropriator may himself sever a portion of tithes, which a spiritual rector cannot do; and that a presumption may therefore be raised against a lay impropriator upon slighter evidence than would be reasonable against a spiritual rector. But this does not affect the principle. If it were necessary, in the case of a spiritual rector, to show the actual origin of a portion of tithes, it is not probable that any such portion could at this day be maintained.

Refuse the motion for a new trial, with costs.

[\*419]

\*BARNEY V. LOCKETT.

1823, 14th June.—*Injunction.*

An injunction to restrain the setting up of an outstanding term in bar of an ejectment, will not be granted upon motion.

MR. PARKER, for the plaintiff, moved, on the coming in of the answer, that the defendant, might be restrained, by the injunction of the court, from setting

(a) 2 Ves. jun. 625. Gwill. 1430.

(b) Gwill. 1174.

(c) Ibid. 1177, and 1 Eden, 276. See particularly pp. 296 and 297.

(d) 17 Ves. 119.

(e) 2 Price, 338, and in D. P. 9th April 1821.

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up a term of one thousand years created in the estate in question in this cause, in defence of the action of ejectment brought by the plaintiff for the purpose of trying his title to the estate.

The plaintiff, by his bill, claimed to be entitled to an estate in Norfolk, as heir at law of one James Moore.

Mr. *Sidebottom*, for the defendant :—The plaintiff has not shown himself to be the heir of J. Moore ; and therefore if this motion is granted, the court may interfere on behalf of a person who has no title to this estate. How can any person proceed in this summary way in a court of equity without having made out his title ?

This is a bill for relief ; and in *Leighton v. Leighton*,<sup>(a)</sup> a decree was made upon such a bill. In *Hylton v. Morgan*,<sup>(b)</sup> a motion similar to the present one was refused ; and in *Aston v. Lord Exeter*,<sup>(c)</sup> the court refused to order, upon motion, even deeds to be produced in aid of an ejectment.

Mr. *Parker*, in reply :—In the cases referred to, the bills were bills for relief. I seek no relief. The bill, in this case, does \*not pray for [\*420] any account, or for the delivery of possession of the premises to the plaintiff, but merely for the injunction.<sup>(d)</sup>

## NORTHEY V. PEARCE and others.

1823, 6th and 28th June.—*Injunction*.

An injunction to restrain the setting up of outstanding terms in bar of an ejectment, will not be granted upon motion.

In this cause a motion was made by Mr. *Knight*, for the plaintiff, similar to that made in the preceding case.

The plaintiff claimed the estates in question in the cause as heir of one Mary Row. The bill prayed for an account of those estates, and of the rents and profits received by the defendants ; for injunctions to restrain the cutting of timber, and the setting up of outstanding terms ; to have the title deeds delivered up to the plaintiff ; and for liberty to examine certain old persons as witnesses at the trial of the ejectment which the plaintiff had commenced to recover possession of the estates. The defendants admitted in their answer that there was a term of nine hundred years in part of the estates vested in a trustee to attend the inheritance.

Mr. *Knight*, for the plaintiff, cited *Leighton v. Leighton*.<sup>(e)</sup>

Mr. *Beames*, contra, cited *Hylton v. Morgan*,<sup>(f)</sup> *Byrne v. Byrne*.<sup>(g)</sup>

<sup>(a)</sup> 1 P. W. 671.<sup>(b)</sup> 6 Ves. 293.<sup>(c)</sup> Ibid. 288.

<sup>(d)</sup> His honor delivered judgment upon this motion, and upon the motion in *Northey v. Pearce*, post, at the same time.

<sup>(e)</sup> 1 P. W. 671.<sup>(f)</sup> 6 Ves. 293.<sup>(g)</sup> 2 Scho. & Lef. 537.

1823.—Watts v. Manning.

[\*421] \*The VICE-CHANCELLOR :—These are bills to aid trials at law by equitable relief ; and the question is, whether the court is to grant this relief upon motion. It is obvious that it may appear, at the hearing, that there are circumstances which entitle the defendants also to equitable assistance in the trials at law. There may be cases for issues, or special admissions may be required from the plaintiffs. These applications by motion are equally against principle and authority.

Refuse both motions, with costs.[1]

### WATTS V. MANNING.

1823, 14th June.—*Practice*.—*Extra costs of amendments*.

Where a bill had been amended three times and the two last amendments were made necessary by the negligence or error of the plaintiffs, the defendant was allowed extra costs for those amendments.

THE court was moved, on behalf of two of the defendants, that it might be referred to the master to tax those defendants their full costs and charges, as between solicitor and client, of the several amendments made by the plaintiffs of their bill in this cause ; that such costs, when taxed, might be forthwith paid by the plaintiffs, or their solicitors ; and that in the mean time all proceedings might be stayed.

The affidavit in support of the motion was to the following effect : The original bill, consisting of four hundred and seventeen folios, was filed in April 1816 ; the answers of all the defendants except one, who was out of the jurisdiction of the court, were put in in that year ; in June 1817 the plaintiffs replied to the bill ; and shortly after the 30th of July following amended their bill ; in May 1819 the plaintiffs again amended the bill, by filing a new [\*422] ingrossment containing four hundred and thirty folios ; in November following they again filed a replication, without waiting for any answer. Under an order obtained in July 1822, they again withdrew their replication, and amended their bill, by filing another new ingrossment of two hundred and seventy-four folios. In January last they again filed a replication ; and in May they obtained another order to amend.

Mr. Knight, in support of the motion, cited the following cases. *Anon.*(a) *Rennet v. Green*.(b) and *Freke v. Culpepper*.(c)

Mr. Duckworth, contra, cited *Deggs v. Colebrook*.(d) and *Earl of Massarene v. Lyndon*.(e)

VICE-CHANCELLOR :—I am not, at present, to inquire whether the sum allowed for costs upon amending a bill is or is not too small. It is adopted as a general rule in order to avoid the inconvenience of entering into the consideration

(a) 2 Atk. 143. (b) 1 Cox, 253. (c) 1 Dick. 284. (d) 1 Atk. 396. (e) 2 Bro. C. C. 291.

[1] Vide *Beer v. Ward*, Jacob. 194.

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Palmer v. The Earl of Carlisle and others.

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of the merits of the amendments in each particular case. But if without entering into the merits of the amendments, there be found, in the circumstances of the case, plain oppression by unnecessary expense, the court will relieve the defendant. In this case there have been three amendments by new ingrossments, and the two last without further answers.

The first of the three amendments may have been made necessary by the answer; and therefore I cannot give the defendant the extra costs of that amendment.' \*But there was no further answer put in before the second and third amendments; and the third amendment reduced the bill from four hundred and thirty folios to two hundred and seventy four. I must assume, therefore, in the absence of all explanation, that these second and third amendments would not have occurred if due diligence and attention had been used on the part of the plaintiff; and the defendant is therefore entitled to be relieved against the extra expense of these two amendments thus unnecessarily occasioned.

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Dame MARY PALMER, widow, v. The Right Hon. FREDERICK Earl of CARLISLE, and others.

1823, 17th June.—*Mortgage.—Pleading.*

A person entitled to part only of a sum of money due on mortgage, can not file a bill for a foreclosure of the same part of the mortgaged estate.

There can be no redemption or foreclosure unless the parties entitled to the whole of the mortgage money are before the court.

ONE of the questions in this cause was, whether a person who was entitled to a sixth part only of a sum of money due on a mortgage could file a bill for a foreclosure of a sixth part of the mortgaged estate.

By an indenture, dated the 20th of January 1770, Lord Carlisle assigned certain manors and other hereditaments to Thomas Hanway, subject to redemption on payment of 12,000*l.* and interest, on the 20th July following.

2,000*l.* part of the 12,000*l.* belonged to Wm. Hanway, a brother of T. Hanway, and the remainder belonged to T. Hanway.

T. Hanway, by his will, gave to his wife, Ann Hanway, 2,000*l.* part of the 10,000*l.* for her own use; \*and he gave 8,000*l.* the remainder [\*424] of that sum, to R. Heron, and Wm. Painter, upon trust, to pay the interest of it to his wife for her life; and after her decease, to pay the interest of 4,000*l.* part of the 8,000*l.* to his nephew, T. Altham, for his life; and after T. Altham's decease, to that gentleman's widow (if he should leave one) for her life; and, after her decease, to pay the principal to T. Altham's children, at the usual periods, in equal shares; and he appointed Jonas Hanway, Richard Heron, and W. Painter, executors of his will.

In September 1772 T. Hanway died. His will was proved by all his ex-



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1823.—Palmer v. The Earl of Carlisle and others.

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cutors. Heron was the survivor of them. He died in 1805; and Sir Robert Heron, one of the defendants, was his personal representative. Ann Hanway, T. Hanway's widow, died in 1778.

Thos. Altham died in 1782, leaving the plaintiff, and Thos. Wm. Altham, his only children.

By articles, dated the 17th day of January 1791, and entered into previously to the plaintiff's marriage with her late husband, it was agreed that all the property, both real and personal, to which the plaintiff was then entitled, should be vested in trustees, in trust to sell, and therewith to discharge the incumbrances then affecting her husband's estates.

T. W. Altham died in 1794, intestate, and the plaintiff took out letters of administration to his estate.

The whole of the 12,000*l.* still remaining unpaid, the plaintiff filed her bill, praying that an account might be taken of what was due to her on the [\*425] mortgage, in respect of the 2,000*l.* her late brother's share, being a sixth part of the 12,000*l.*; and that Lord Carlisle might be decreed to pay what should be found due to her, or be foreclosed from all equity of redemption in one sixth part of the mortgaged premises.

None of the persons who had any interest, either legal or equitable, in the 12,000*l.* except the plaintiff and Sir Robert Heron, were made parties to the suit; nor was any reason assigned in the pleading for that omission.

Lord Carlisle, by his answer, submitted that an account should be taken of the whole of the 12,000*l.* and not of the 2,000*l.* only; as otherwise he might be put to unreasonable and unnecessary charges in taking many different accounts in respect of the same mortgage.

Mr. *Horne*, and Mr. *Longley*, for the plaintiff:—In *Montgomery v. The Marquis of Bath*, (a) a decree was made for a partial foreclosure. The registrar's book has been looked at, in order to see if the decree in that case was made by consent; and it does not appear that that was the case.

Mr. *Barber*, for Sir Robert Heron.

Mr. *Heald*, Mr. *Wingfield*, Mr. *Sugden*, and Mr. *Tinney*, for the other parties to the suit.

The VICE-CHANCELLOR:—There can be no foreclosure or redemption, unless the parties entitled to the whole mortgage money are before the court. The bill must be dismissed against Lord Carlisle, with costs.

(a) 3 Vcs. 560. But see *Lowe v. Morgan*, 1 Bro. C. C. 368.

1823.—*Williams v. Davies.*

\**WILLIAMS v. DAVIES.*

[\*426]

1823, 27th June.—*Exceptions.*

Exceptions having been allowed to the answer, and the bill having been amended, and the usual order obtained that defendant should answer the amendments and exceptions at the same time, defendant put in a second answer. The plaintiff then took exceptions to the second answer, and intitled them, "exceptions to the further answer to the original bill, and to the answer to the amended bill."

The exceptions were held to be irregularly intitled, and were ordered to be taken off the file; because new exceptions cannot be taken to the further answer to the original bill; but, if that answer be considered insufficient, it must be referred back to the master upon the old exceptions.

THE plaintiff (a married woman) had taken exceptions to the answer; and, on some of them being allowed, obtained an order that she should be at liberty to amend her bill, and that the defendant should answer the exceptions and amendments at the same time.

In obedience to this order, the defendant put in a further answer to the original bill, and an answer to the amended bill. The plaintiff then took exceptions to the answer to the amendments, and, on the 18th of this month, obtained another order, by which, after reciting that the plaintiff had taken exceptions to the answer to the original bill, and that that answer was reported insufficient; whereupon the plaintiff obtained an order to amend her bill, and that the defendant should answer the exceptions and amendments at the same time; and that the defendant had since put in his answer to the said exceptions and amendments, and that the plaintiff was advised that that answer also was insufficient, and that she had taken exceptions thereto as to the amendments: It was ordered, that it should be referred back to the master, to look into the plaintiff's bill, the said defendant's said answers, and the plaintiff's said exceptions; and to examine and certify whether the said defendant's said answer to the said exceptions and amendments was sufficient or not.

\*The second set of exceptions was intitled as follows: "exceptions [\*427] taken by the said complainant to the further answer put in by the said defendant, Lewis Davies, to the original bill of complaint, and his answer to the amended bill of complaint filed by the said complainant in this cause."

Mr. Bell, and Mr. Barber, for the defendant, now moved that these exceptions might be taken off the file, for irregularity; that the plaintiff's next friend might be ordered to pay the costs of the application, and of filing the exceptions; and that the order of the 18th June might be discharged.

These exceptions purport to be exceptions to the further answer to the original bill, as well as to the answer to the amended bill; and, if they went to the master under that title, he would not be able to dispose of them. The answer to the amended bill, for the purpose of being excepted to, is quite distinct from the further answer. The sufficiency of the further answer, and of the answer to the amended bill, ought to be submitted to the master

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as two distinct questions; and therefore the proper way is to intitle the new exceptions as exceptions to the amended bill, and to obtain an order for referring back the further answer upon the old exceptions. It is extremely doubtful whether the order of the 18th of June did refer back the further answer upon the old exceptions. *Partridge v. Haycraft.*(a)

Mr. *Treslove*, for the plaintiff:—The title to these exceptions is [\*428] quite regular according to the practice of the court. In taking \*exceptions, it is necessary to refer to the answer with certainty. Now if these exceptions had been intitled as exceptions to the answer to the amended bill, the defendant would have said there is no such record. The record is indivisible, and it purports to be a further answer to the original bill, as well as an answer to the amended bill. If we were proceeding by indictment for perjury in this answer, and the indictment were to allege that exceptions had been taken to the answer to the amended bill, there would be a variance when the record was produced. The Lord Chancellor, in his judgment in *Partridge v. Haycraft*,(b) says, "That where an original bill has been filed, and exceptions have been taken to the answer, and the plaintiff moves to amend, if he goes upon the answer to the original and amended bill as insufficient, he must go before the master upon the old exceptions, as they apply to the original bill, and upon the new exceptions as to the new matter introduced by the amendments." That is what the plaintiff has done here. The order of the 18th of June, clearly refers back the further answer upon the old exceptions, as exceptions, as well as the answer to the amended bill upon the new exceptions: for the expression "said exceptions," must mean both sets of exceptions; and the next sentence makes it quite plain; for there it is referred to the master "to examine and certify whether the said defendant's said answer to the said exceptions and amendments is sufficient.

But supposing that the title to these exceptions is wrong, it is not necessary that they should be taken off the file; for they may be amended, as was done in a case in the exchequer, where an answer was filed without the [\*429] \*schedule being signed; the court would not order the answer to be taken off the file, but only directed the schedules to be signed.

The VICE-CHANCELLOR:—These exceptions are intitled as exceptions to the further answer to the original bill, and the answer to the amended bill. As exceptions to the amendments they are regular; but no new exceptions can be taken to the further answer to the original bill. If that part of the answer be considered insufficient, it must be referred back to the master upon the old exceptions. These exceptions, therefore, being irregularly intitled, must be taken off the file.[1]

(a) 11 Ves. 570.

(b) 11 Ves. 58P.

[1] Vide *The Bennington Iron Co. v. Campbell and others*, 2 Paige, 159. *Van Wageningen v. Murray*, 1 Edw. 319.

1823.—*Acton and others v. White and another.**Acton and others v. White and another.*1823, 27th June.—*Will.*—*Power to alienate separate property.*

Testator devised a freehold estate to trustees, in trust, to pay the rents, as the same should become due and payable, into the hands of his wife, and not otherwise, for her life, for her separate use; and directed that the receipts of his wife alone for what should be actually paid into her own proper hands, should be good discharges to his trustees. Held, that the wife had power to alienate her life estate.

This suit was instituted for a specific performance of an agreement which the defendant had entered into for the purchase of the Royal Hotel at Bognor, in Sussex, and certain lands, part of the real estates of the late Nathaniel Wright, and which had been devised by him to trustees, in trust for the separate use of his wife, Sarah Wright, for her life; and after her decease, in trust for the plaintiff, Samuel Acton, in fee. Mrs. Wright was willing to join in the conveyance to the purchaser; but the latter objected to the title, on the ground that Mrs. Wright was, by the terms of the will, restrained from alienating her life estate.

\*The part of the will necessary to be stated in order to explain the [\*430] arguments in support of the objection, was as follows:

"I give, devise, and bequeath, unto Samuel Acton, Sir L. Harvey, and T. Greenaway, their heirs, executors, administrators, and assigns, all and every my estate and effects, both real and personal, whatsoever and wheresoever, that I am in anywise entitled to or interested in, in possession, reversion, remainder, or expectancy, to hold, as to such parts thereof as are freehold, unto and to the use of them the said S. Acton, Sir L. Harvey, and T. Greenaway, and their heirs; and as to such part thereof as is considered a part of my personalty, to hold such last-mentioned part thereof unto them the said S. Acton, Sir L. Harvey, and T. Greenaway, their executors and administrators; but upon this special trust and confidence nevertheless, as to the whole of the said real and personal estate, that they the said S. Acton, Sir L. Harvey, and T. Greenaway, their heirs, executors, and administrators, do and shall, after payment of my just debts, funeral expenses, and the legacies by me herein bequeathed, (to the payment of which I subject and make liable all my estate and effects, as well real as personal, and also of the costs and charges attending the carrying into execution the trusts of this my will,) pay, or cause to be paid, all the rents, interest, and dividends, and proceeds of all and every my aforesaid freehold, leasehold, and other my personal estate and effects, of what nature or kind soever, unto and for the sole and separate use of my said wife, during the term of her natural life, and so as not to be in anywise subject to the debts, control, or engagements of any future husband she may happen to marry after my death; and to that end, that they the said S. Acton, Sir L. Harvey, and T. Greenaway, and the survivors and \*survivor of them, his [\*431] executors or administrators, do and shall from time to time pay the dividends, interest, and annual produce, as the same shall become due and pay-

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 1823.—Acton and others v. White and another.
 

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able, into the hands of her the said Sarah Wright, and not otherwise. And I will also, that the receipt or receipts of my said wife, Sarah Wright, alone, for what shall be actually paid into her own proper hands as aforesaid, for and in respect of the rents, interest, dividends, or annual produce, shall from time to time, notwithstanding her coverture, and whether she shall be covert or sole, be a good and sufficient discharge and indemnity to the said S. Acton, Sir L. Harvey, and T. Greenaway and the survivors and survivor of them in respect thereof."

The parties had agreed to take the opinion of the Vice-Chancellor upon the validity of the objection before mentioned, and to be bound by that opinion.

Mr. *Sudgen*, for the purchaser:—In deciding this question, the court must look at the actual words used by this testator. No one doubts, that if he had said that his wife should not have power to anticipate the rents of these estates, she would not have been able to part with her life estate. The words here used are stronger than any that ever occurred, except where words of actual restriction are used. For here the testator directs that the rents shall be paid, as they shall become due and payable, into the hands of his wife, and not otherwise; not into the hands of her or her appointees, as in ordinary cases. How is it possible for the court to say, that by these words the testator did not mean to restrain his wife's power of alienation? There is no other way to give effect to all the words of this will than by construing [\*432] these words \*to amount to a restriction of the power of alienation. Then the testator says, that the receipt of his wife alone shall be a sufficient discharge. Here the word "alone" does not mean "without her husband," but points to an absolute restriction. I must refer your honor to a case mentioned by Sir W. Grant, M. R. in his judgment in *Wagstaff v. Smith*; (a) there, that learned judge, in a case where the words were not nearly so strong in favor of a restraint on alienation as those now under consideration, says, that he thought that an absolute property was not intended to be given so as to give a power of disposition. But should your honor be of opinion that this lady has power to alienate her life interest, I submit that these words raise so serious a doubt upon that point, that a specific performance ought not to be decreed.

Mr. *Bell*, Mr. *Preston*, and Mr. *Lovat*, were to have argued in support of the title.

The VICE-CHANCELLOR:—It is now too late to contend that a lady is restrained from the power of alienating her life interest, because it is given to her sole and separate use, and is to be paid into her own proper hands, and upon her receipt alone. The contrary is settled by repeated authorities. The construction given to the expressions in question is, that they are intended only to exclude the marital claims of any present or after-taken husband; and

1823.—Pratt v. Archer.

not to control that right of disposition which is incident to property. Let a specific performance of the agreement be decreed [1]

\*PRATT v. ARCHER.

[\*433]

1823, 28th June.—*Practice*.—*Amendment, without prejudice to injunction.*

Where an injunction has been granted on merits, a motion to amend, without prejudice to the injunction, is a motion of course; but where it has issued on account of delay, notice of the motion must be given, and the proposed amendments must be stated.

In this case the common injunction had been obtained; and Mr. Sugden, and Mr. Wray, for the plaintiff, now moved to amend the bill, without prejudice to the injunction, by adding a prayer to restrain a proceeding by distress.

Mr. Knight, for the defendant, opposed the motion.

The Vice-Chancellor said, that upon referring to Mr. Walker, the registrar, as to the practice in cases of amendment without prejudice to injunctions, he had stated, that the subject had come before the Lord Chancellor, and that he understood it to be his lordship's opinion, (although his lordship had never absolutely decided the point,) that a motion to amend without prejudice to an injunction, was a motion of course, and might be made without notice, where the injunction had been granted on the merits; but that where the injunction had issued on account of delay, notice must be given, and the proposed amendments stated. (a)

\*WINTER v. LORD ANSON.

[\*434]

1823, 23d July.—*Lien*.—*Purchase money.*

Where the purchase money for an estate was, in pursuance of the agreement for the purchase, secured by the bond of the purchaser, payable at the death of vendor, with interest; but the convey-

(a) See *Turner v. Bazely*, 2 V. & B. 330; *Sharp v. Ashton*, 3 V. & B. 144; and *Mair v. Thellusson*, in the note on that case. But *Penfold v. Stoevel*, 3 Mad. 741, is *contra*. [Vide *Warburton v. London, &c. Railway Company*, 2 Beav. 263. *Furand v. Hamer*, 4 Myl. & Cr. 145, 146.]

[1] Property given to a woman for her separate use, independent of any husband, may be enjoyed by her as her separate estate, although the property becomes vested in her while discovert. If the gift be made for her separate use, without more, she has, during coverture, an alienable estate independent of her husband; but if the gift be for her separate use without power of alienation, she has during coverture an inalienable estate independent of her husband; in either case, however, she has, while discovert, a power of alienation which may be suspended and again revive. *Tullett v. Armstrong*, 1 Beav. 1. Affirmed, 4 Myl. & Cr. 377, 407. *Scarborough v. Borman*, 1 Beav. 34. Affirmed, 4 Myl. & Cr. 407, in which two cases the subject was elaborately discussed at the bar and by the court. And see further *Barton v. Briscoe*, Jac. 603. *Woodmeston v. Walker*, 3 Russ. & Myl. 197. *Jones v. Saller*, id. 208. *Brown v. Powck*, id. 210. S.C. 2 Myl. & K. 189. 5 Sim. 683. *Simson v. Jones*, 2 Russ. & Myl. 365. *Massey v. Parker*, 2 Myl. & K. 174. *Anderson v. Anderson*, id. 427. *Newton v. Reid*, 4 Sim. 141. *Knight v. Knight*, 6 Sim. 191. *Benson v. Benson*, id. 126. *Davies v. Thornycroft*, id. 420. *Stiffe v. Ezeritt*, 1 Myl. & Cr. 37. *Neddy v. Neddy*, 4 Myl. & Cr. 367.

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ance expressed that it had been paid, and had the vendor's receipt indorsed upon it : held, that the vendor had no lien on the estate for the amount of the bond.

Where a conveyance is executed to a purchaser, which expresses that the purchase money is paid the estate does not, in equity, pass by the conveyance till the purchase money is actually paid, although a receipt for the purchase money is indorsed on the conveyance.

Where a vendor agrees to sell real estate, in consideration of a bond for the purchase money payable at a future period, with interest in the meantime, the estate passes to the purchaser on the execution of the bond and of the conveyance, and the vendor has no lien for the amount of the bond.

THIS was a bill by the personal representatives of a vendor, against a purchaser, who had become bankrupt, and his assignees ; and also against a purchaser from the assignees, to establish a lien upon real estate for part of the purchase money.

William Winter, the vendor, was in June 1814 seised in fee of an estate, partly freehold, and partly copyhold. By articles of agreement, dated the 16th of June 1814, made between William Winter of the one part, and William Mousley of the other part, Winter, in consideration of the sum of money therein mentioned agreed to be paid to him by Mousley, agreed to convey and surrender the freehold and copyhold estate to Mousley in fee simple, free from all incumbrances ; and Mousley agreed to pay to Winter, on the 29th of September then next ensuing and on the execution of the conveyance and completion of the surrender, the sum of 75*l.* per acre for the estate, the quantity of land to be ascertained and measured by a person named in the agreement, and to be paid for by Mousley accordingly ; and it was thereby also agreed in the following words : " That the amount of such consideration money shall be secured by the bond of the said William Mousley unto the said William Winter, with interest, at 4*l.* per centum per annum, and shall remain so secured during the life of the said William Winter, on the regular payment of such interest as aforesaid."

\*435] "The estate was measured, and the purchase money found to amount to 1,485*l.* ; being 576*l.* for the freehold, and 909*l.* for the copyhold. By indentures of lease and release, dated the 28th and 29th of September 1814, and made in pursuance of the agreement, Winter, in consideration of 576*l.* therein expressed to have been paid to him at or before the execution of the conveyance, for the purchase of the fee simple of the freehold part of the estate, conveyed the freehold part of the estate to Mousley in fee simple. A receipt for the 576*l.* was indorsed on the deed of release. On the 1st of October 1814, in further pursuance of the agreement, Winter surrendered the copyholds to Mousley in fee simple ; and this surrender was expressed to be made in consideration of 909*l.* paid by Mousley to Winter, the receipt whereof Winter thereby acknowledged.

Notwithstanding the conveyance and surrender expressed that the whole purchase money had been paid, the sum of 485*l.* was the only part of it that had in fact been paid. And on the 29th of September 1814, Mousley executed a bond to Winter in the penal sum of 2,000*l.* conditioned to be void on payment, by Mousley to the executors, administrators or assigns of Winter, of

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the sum of 1,000*l.*; the remainder of the purchase money within twelve months next after the decease of Winter, with interest at four per cent.

Mousley having paid the 485*l.* and executed this bond, was let into possession of the estate.

By deed, dated the 2d of November 1814, Mousley mortgaged the freehold part of the estate for the term \*of five hundred years, to Anne [\*436] Baggalay, to secure 400*l.* which he had borrowed of her; and on the 10th of May 1815, he surrendered the copyholds to one Gould, in fee, to secure 1,000*l.* which he had borrowed of Gould.

In May 1817 a commission of bankrupt issued against Mousley; and, on the 7th of June 1817, the bargain and sale to his assignees was executed. In August 1817, the assignees sold and conveyed the freehold and copyhold estate in question to Lord Anson, together with some other real estates belonging to Mousley, and allowed his lordship to retain 1,200*l.* of the purchase money, as an indemnity against the claim of the plaintiff. The assignees paid off the mortgages to Anne Baggalay, and Gould, out of the personal estate of Mousley.

The interest on the bond was paid down to the 29th of September 1816, but not afterwards; and Winter, in Trinity term 1818, brought an action against Mousley on the bond, and at the Lent assizes in 1819 obtained a verdict against him. Mousley obtained a rule *nisi* to set aside the verdict, on the ground that he was a bankrupt at the time when the action was brought; but this rule was afterwards discharged.

Mousley obtained his certificate under the commission of bankrupt.

In May 1819 Winter died, without having entered up judgment on the verdict against Mousley; and the plaintiffs, who were the executors of Winter, had not \*entered up judgment, because Mousley had no property on [\*437] which it could be made available.

The plaintiffs insisted, by their bill, that Anne Baggalay, and Gould, the mortgagees of the estate, had notice of the lien on the estate claimed by Winter in respect of the 1,000*l.*; and that, if the mortgages were still subsisting they would not be entitled to any priority over the lien so claimed. They also insisted that the assignees had notice of the lien; and that, although they had paid off the mortgages out of Mousley's personal estate, they were not entitled to re-imburse his personal estate out of the money produced by the sale of his real estates, until they had discharged the sum in respect of which the lien was claimed; or, in case the court should be of opinion that the mortgages, if subsisting, would be a prior charge to the lien, that, inasmuch as the mortgages had been paid off by the assignees, the estates must now be considered as free from all claims and incumbrances, except the lien claimed by the plaintiffs.

The bill prayed that it might be declared that the plaintiffs, as the personal representatives of Winter, were entitled in equity to a lien upon the freehold



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and copyhold estate, in respect of the 1,000*l.*, as well against the mortgagees, and all persons claiming on their behalf, as against Mousley; and for an injunction to restrain Lord Anson from paying over the 1,200*l.* to the assignees until the claim of the plaintiffs was satisfied.

The assignees, in their answer, stated that they had been informed, and believed, that upon the occasion of Mousley executing the bond, it was agreed between Winter and Mousley, that Winter should accept the [\*438] \*bond as payment of so much of the purchase money as the bond amounted to, and that Winter should have no claim or lien upon the estate in respect of it.

When the cause came on to be heard on the 27th of November, 1821, the Vice-Chancellor referred it to the master, to inquire, whether, at the time of executing the bond, it was agreed between Winter and Mousley, that Winter should accept the bond as payment of so much of the purchase money as the bond amounted to; and that Winter should have no lien upon the estate in respect of it.

The master reported as follows:—"I find, that upon the execution, by the defendant William Mousley, of the bond bearing date the 29th day of September, 1814, it was not agreed between William Winter therein named, and the said defendant William Mousley, that the said William Winter should accept of the said bond as payment of so much of the purchase money of the estates and premises in question in this cause as the said bond amounted to, and that the said William Winter should have no lien upon the said estate and premises, or any part of the same in respect thereof. But I find, by the deposition of Francis Sharrett, one of the witnesses, taken on the cross interrogatories exhibited on the part of the defendants, and the person who prepared the said agreement as the attorney of the said William Winter, that in or about a week after the agreement bearing date the 16th day of June, 1814, had been made, and previously to the execution of the said bond, he, in conversation with the said William Winter, pointed out to him the imprudence of trusting to the personal security alone of the said William [\*439] Mousley for the payment of the said purchase \*money. And the said Francis Sharrett told the said William Winter, that he, the said Francis Sharrett, knew that the said William Mousley was concerned in extensive trade and speculations, and had borrowed money. And the said Francis Sharrett strongly urged the said William Winter to have a mortgage for the purchase money, and told him, that he the said Francis Sharrett thought there would be considerable danger in taking a bond only; but the said William Winter replied that the bond would be a sufficient security; and that he had no doubt, if the said William Mousley outlived him, the bond would be paid; and that he should be satisfied to take the said William Mousley's personal security."

The cause now came on to be heard for further directions.

Mr. *Heald*, and Mr. *Wheatley*, for the plaintiffs:—The settled principle of the court is, that a vendor has always a lien on the estate till the whole of his

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purchase money is paid, unless there be a manifest intention that he should have no such lien. That was the principle laid down in *Mackreth v. Simmons* (a) where Lord Eldon reviews the whole of the cases on this subject. It was there held that there must be clear evidence of relinquishment of the lien; and that it is for the purchaser to produce this evidence if he resists the lien. In *Tardiff v. Scrughan*, stated in the argument of *Blackburne v. Gregson*, (b) it was decided by Lord Camden, that the vendor of an estate in consideration of an annuity, did not, by taking a bond from the purchaser as a collateral security for the payment of the annuity, lose his lien on the [\*440] estate. In *Elliot v. Edwards* (c) Lord Alvanley held that the vendor, by taking a covenant from the purchaser and another person as his security, did not lose his lien on the estate. *Fawell v. Heelis* (d) is the only case in which it was ever held that the vendor, by taking a bond for the purchase money, had lost his lien on the estate. But that case has not been considered as good authority. In *ex parte Parkes*, (e) which is one of the latest cases, it was admitted that the lien of the vendor was not discharged by his taking a bond from the purchaser for payment of the purchase money; although it was held, that the nature of the covenants, and of the transaction in that case, had discharged the lien.

Mr. Skirrow, for the defendant, Mousley, the bankrupt, (who had an interest in establishing the lien,) insisted, that postponing the payment of the principal of the purchase money during the life of the vendor afforded no argument against the continuance of the lien, because the purchaser might at any time have got rid of the lien by paying up the principal.

Mr. Bell, and Mr. Bickersteth, for the defendants, the assignees:—

I. The principle on which courts of equity admit the lien of the vendor is not that of contract, but that, until the purchase money is paid, the estate in equity is the estate of the vendor. On this principle it has been held that, where the consideration money was not paid *pecuniis* [\*441] *numeratis*, but by a check on a banker, if the banker had no effects, the lien was clearly not gone. Nor is it gone where the purchaser gives a promissory note for the purchase money; nor even where he gives a bond, if it be payable at a short period. But the question in this case is, whether the security was not taken as an actual discharge of the purchase money. The bond here was not taken as a collateral security, but as an actual payment, so as to give the purchaser an absolute dominion over the estate. If the purchaser had given a bill, or a bond, which was not paid at the date fixed for that purpose, it would have been impossible to say that the purchaser was paid, or the lien discharged. Lord Eldon says, in *Mackreth v. Simmons*, (f) that the intent in taking a bond is to rebut the presumption that the purchase money is paid. But if a bond is taken, on the face of which it appears that the purchase

(a) 15 Ves. 339.

(b) 1 Bro. C. C. 423.

(c) 3 Bos. &amp; Pul. 181.

(d) Amb. 724; and also stated from Serjeant Hill's MSS. in Mr. Eden's edition 1 Bro. C. C. 423, in a note to *Blackburne v. Gregson*.

(e) 1 Glynn &amp; Jam. 238.

(f) 15 Ves. 312.

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money is to be paid by an annuity to the vendor, and the payment of a principal sum to his representatives at his death, this shows a special contract—it shows that the parties were not dealing for ready money, but on a special contract as to the mode of payment, and therefore that the lien is discharged. The lien being once discharged by the mode in which the parties have dealt, it is gone for ever.

II. The principle of the court being against the existence of lien in such a case, it only remains to consider the authorities. Lord Eldon, in *Mackreth v. Symmons*,<sup>(g)</sup> said, that *Tardiff v. Scrughan*,<sup>(h)</sup> was not a case of [\*442] such authority as to guide his judgment. The case of *Edwards v. Elliot*,<sup>(i)</sup> has no application to the present. In order to make out the case of the plaintiffs, the bond ought to have been unalienable during the life of Winter. In *Bond v. Kent*,<sup>(k)</sup> where the vendor took a promissory note, payable on demand, from the purchaser for part of the purchase money, it was held that the lien was discharged; and so in *Nairn v. Prowse*,<sup>(l)</sup> where the vendor took a security on stock. Therefore, according to the authorities, collateral circumstances may be resorted to in order to rebut the presumption of lien. In the present case we resort to the agreement. The bond secures payment of the purchase money, according to the terms of the agreement, as to the *quantum* of the money; therefore the bond and the agreement depend sufficiently on each other to rebut the presumption of lien. The special circumstances stated by the master in his report show that the vendor placed reliance on the personal security of the purchaser. Where a purchaser is allowed to take possession of an estate as absolute owner on a conveyance expressing receipt of the purchase money by the vendor, and the vendor takes a bond as a security, to allow the vendor still to have a lien, would be to enable the purchaser to commit fraud; because in such a case he appears in the character of absolute owner of the estate, and obtains credit in that character. This is exactly the inconvenience insisted on by Sir W. Grant, in the case of *Nairn v. Prowse*.<sup>(m)</sup>

Mr. Heald, in reply:—If the mode of payment expressed in the [\*443] agreement had appeared upon the face of the deed of conveyance, \*it would have entirely destroyed the argument as to fraud; and the mere circumstance that it was a mode which postponed the payment of the principal, would not be enough to discharge the lien. If the conveyance had been expressed to be made in consideration of an annual payment, even in that case the argument as to fraud would fail. But whatever may be expressed in the articles of agreement, the court, if it finds a conveyance executed, cannot look at the articles, because that would be giving a construction to a deed by an instrument which is not a deed. The case, therefore, on the whole, comes to this: that the intention to abandon the lien must be established on clear evidence: that a bond or a note taken by the vendor has been held not of itself

<sup>(g)</sup> 15 Ves. 352.<sup>(k)</sup> 2 Vern. 280.<sup>(h)</sup> Stated in 1 Bro. C. C. 423.<sup>(l)</sup> 6 Ves. 752.<sup>(i)</sup> 3 Bos. & Pull. 181.<sup>(m)</sup> 6 Ves. 752.

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sufficient evidence of abandoning the lien; and therefore, that taking a bond payable at a future time is not sufficient evidence to rebut the presumption that a lien exists.

**The VICE-CHANCELLOR:**—This case is altogether new in its circumstances. The written agreement of the parties expresses that the price of the estate should not be paid till the death of the vendor, the vendee agreeing to pay interest upon it by half yearly payments until that period, and to give his bond accordingly. But the language of the conveyance does not proceed upon this agreement. It is expressed to be made in consideration of a sum of money then paid, the receipt for which is indorsed upon the deed. The terms of the written agreement, however, did in fact govern the conduct of the parties, and a bond was taken for the payment of the purchase money at the death of the vendor, and for payment of interest in the mean time; and the question is, whether, \*under these circumstances, the vendor has a lien [\*444] upon the estate.

In ordinary cases, where the conveyance expresses, contrary to the fact, that the purchase money is paid, there, though the estate passes at law by the conveyance, it does not pass in equity until the actual payment of the price—until the vendor has received that consideration for which it appears by the deed he contracted to part with his estate.

Suppose it had been expressed in this conveyance that the price was not to be paid until the death of the vendor, and there had been a covenant on the part of the purchaser then to pay the amount, and to pay the interest in the mean time; could it then have been said that it appeared by this deed that the vendor had contracted not to part with his estate until the actual payment of the price? Would it not rather have been the true effect of the language of the conveyance in such case, that the vendor had contracted to part with his estate presently, not in consideration of the actual immediate payment of the price, but in consideration of the covenant for the future payment of that sum, with interim interest; and that having, therefore, the covenant, which was the consideration bargained for, the estate must pass by the conveyance, in equity as well as at law. Now although it is not expressed in this conveyance that the price was not to be paid until the death of the vendor, yet such was, in fact, the actual agreement and substantial dealing of the parties, and the language of the conveyance to the contrary is the mere result of the common form; and the question comes to this, whether the court is concluded by the \*form of the deed from entering into the truth of the case. [\*445]

If the language of the deed is to prevail in this case, then the price is to be taken as actually paid; for so it is expressed in the deed. It is the vendor, therefore, who in the first place attempts to raise an equity against the allegations of the deed; and if the vendor be permitted to repel the effect of the deed, by showing that the price was not paid, it must necessarily follow that the vendee must be at liberty to disclose the whole truth, and to explain

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the reason why that payment was not made. I consider, that the case is, in principle, the same as if the conveyance had stated the real contract of the parties; and that by the effect of that contract the vendor agreed to part with his estate, in consideration of the bond for the future payment of the price; and that when such bond was executed, the estate passed to the vendee, in equity as well as at law.

Bill dismissed.[1]

[\*446]

\*WHITTUCK v. LYSAGHT.

1823, 26th April, 2d May, 6th and 7th June.—*Practice.—Witness.*

A party who examines a witness is bound to keep him in town for forty-eight hours after his production at the seat of the adverse clerk in court; and, if cross-interrogatories are left with the examiner within the forty-eight hours, the party must keep the witness in town till the cross examination is finished.

Where a witness left London before the forty-eight hours were expired, the party producing him was ordered to bring him back at his own expense, or the examination in chief to be suppressed.

In this cause the court was moved, on behalf of the defendant, that the plaintiffs, or their solicitor, might at their own proper costs and charges, produce two witnesses named in the notice of motion, within ten days, to be cross-examined on the part of the defendant, or, in default of such production, that the evidence given in chief by these two witnesses might be suppressed.

On the 18th of March, 1823, the two witnesses were brought to town from Gloucestershire by the plaintiffs, to be examined on their behalf. At eleven

[1] "The vendor has a lien on the estate for the purchase money, while the estate is in the hands of the vendee, and when there is no contract that the lien, by implication, was not intended to be reserved." "It is for the purchaser to show that the vendor agreed to rest on other security. The death of the vendee does not alter the claim." "Taking a note for the purchase money does not affect the vendor's lien; and if part be paid, the lien is good as to the residue." Kent, *Ch. Garson v. Green and others*, 1 Johns. Ch. Rep. 308. Walworth, Ch. considers the safer rule to be, "to sustain the implied lien whenever the vendor has taken the mere personal security of the vendee only, and to consider any bond, note or covenant given by the vendee alone, as intended only to countervail the receipt of the purchase money contained in the deed, or to show the time and manner in which the payment is to be made, unless there is an express agreement between the parties to waive the equitable lien; and on the other hand to consider the lien as waived whenever any security is taken on the land or otherwise, for the whole or any part of the purchase money, unless there is an express agreement that the equitable lien on the land shall be retained." *Fish v. Howland*, 1 Paige, 20. By joining a third person as security for payment, the lien is lost. *Ibid.* So, if the vendee sells to a purchaser, without notice of the lien. *Ibid.* So, where the payment is contingent, *Clarke v. Royle*, 3 Sim. 499. Where the purchase money is trust money, *White v. Wakefield*, 7 Sim. 401. Possession by the vendor, as tenant to the purchaser is not notice of his lien. *Ibid.* The American cases on the subject of the lien of vendor are collected in Amer. Ch. Digest, Vendor and Purchaser, V.

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o'clock on that day they were produced at the seat of the defendant's clerk in court, and within a few minutes afterwards were carried to the examiner's office and examined. Their examination did not last above a quarter of an hour. On the following morning, as soon as the office was opened interrogatories were filed for their cross-examination; and, between twelve and two o'clock on the same day, the defendant's solicitor sent for the witnesses, and brought them to the examiner's office, where they were then sworn to give evidence for the defendant on cross-examination; and the examiner then desired them to return at ten o'clock on the following morning (the 20th of March) to be cross-examined. They did not, however, attend at the time appointed; but set off in the afternoon of the 19th of March, on their return into Gloucestershire, in a stage-coach, in which places had been taken for them by the plaintiff's solicitor. The defendant's solicitor, being informed of this, on the 20th of March served a notice \*on the plain- [\*447] tiff's solicitor, requiring him to produce these two witnesses at the examiner's office on the 26th of March, to be cross-examined. This notice not being complied with, the present motion was made. The plaintiffs afterwards offered to bring the witnesses to town to be cross-examined, provided the defendant would pay the expenses of bringing them and sending them back; but this offer was refused.

It appeared that no notice of the cross-interrogatories having been filed was either delivered to, or put up in the office of the examiner who had taken the depositions in chief.

*Mr. Bell*, and *Mr. Stuart*, for the motion:—It is the established practice that, where witnesses from the country are produced to be examined in chief, the party producing them is bound to keep them in town for forty-eight hours from the time of producing them at the seat of the clerk in court of the opposite party; and if, during that time, interrogatories are filed for cross-examining them, and they are sworn to give evidence on the cross-examination, the party who has brought the witnesses to town is bound to keep them in town, at his own expense, till the cross-examination is finished; and, if he allows the witnesses to leave town before the forty-eight hours are expired, or before the cross-examination is finished, he is bound to bring them up again to be cross-examined, at his own expense. *Gilb. For. Roman. 144. Flowerday v. Collett.*(a)

*Mr. Hart*, and *Mr. Wakefield*, for the plaintiffs, insisted that notice should have been given to the plaintiff's solicitor, that it was intended [\*448] to cross-examine the witnesses. Where a witness is produced at the seat of the clerk in court, the party intending to cross-examine him ought to give notice, either that interrogatories for cross-examination of the witness are filed, or that it is intended to file them. If no such notice is given, the party is not bound to keep the witness in town, and the party wishing to

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cross-examine must bring him back at his own expense. Harr. Cha. Prac. 261.

The Vice-Chancellor said, that he would direct a question to be sent to the six clerks to ascertain the practice on this point.

A question was accordingly sent, and the six clerks certified :

"That the party examining a witness in the examiner's office is bound to keep him in London forty-eight hours after his production at the seat of the adverse clerk in court, and not forty-eight hours after the examination is finished ; and that, if the cross-interrogatories are left with the examiner within the forty-eight hours, then the party producing him must keep him in London till his cross-examination is finished."

The Vice-Chancellor, upon receiving this certificate, granted the motion, with costs.

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"This court doth order, that the plaintiffs, at their own expense, do produce George Jeffries and Job Jenkins before John Nursey Dancer, one of [\*449] the examiners of this court, within ten days after service of his order on the plaintiffs, to be cross-examined as witnesses on the part of the defendant Arthur Lysaght, or, in default of such production, it is ordered, that the evidence given in chief by the said George Jeffries and Job Jenkins, on behalf of the said plaintiffs, be suppressed on the hearing of this cause, and on all matters relating thereto ; and it is ordered that the plaintiffs do pay to the defendant his costs of this application."

Reg. Lib. B. 1822, fol. 1921.

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#### BARCLAY v. RAINE.

1823, 12th and 24th July.—*Specific performance.—Title deeds.*

A purchaser is not bound to complete his purchase without the title deeds, unless he has a legal covenant to produce them.

A covenant to produce title deeds runs with the land for the benefit of purchasers, but not for the benefit of vendors. Where one is in possession of title deeds relating to his own lands as well as to the lands of another person, who has no covenant for the production of the title deeds, whether such other person has a general right in equity to compel the production of the deeds. *Quere ?*

THE plaintiffs filed this bill to compel the defendant specifically to perform an agreement for the purchase of a freehold estate.

An order was obtained, on the coming in of the answer, for a reference to the master to inquire whether the plaintiffs could make a good title. The master reported, that the plaintiffs could make a good title : but that it appeared to him that the plaintiffs were not in possession of, and were not in a situation to deliver to the defendant the title deeds relating to the estate. At the re-

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quest of the parties the master stated, in his report, the following facts as to the title deeds for the opinion of the court :—

\*The premises in question in this cause were formerly part of cer- [\*450]  
tain hereditaments held under one title, and a large proportion of such  
hereditaments was sold to Mr. John Thring ; and, about the same time, or soon  
after, the premises in question were sold to Mr. George Barclay, the father of  
the plaintiffs, and under whom they derive their title. Upon the sale to Mr.  
John Thring, the title deeds to the premises purchased by him, which also re-  
lated to the premises in question in this cause, were delivered to him, and he  
executed a deed of covenant to the then vendors, bearing date the 12th day  
of July 1797, whereby he covenanted with them to produce, at their request,  
the title deeds, for such purposes as should be required by the then vendors,  
their heirs, executors, administrators and assigns, and at their expense. An  
attested copy of this deed of covenant was delivered to Mr. George Barclay  
by his vendors, and was, at the time when the master made his report, in the  
possession of the plaintiffs ; but it was in a very mutilated state, and partly  
illegible. This attested copy was produced before the master, who found that  
a considerable part of it was destroyed, and that the names of the attesting  
witnesses were decayed, torn or obliterated. No deed of covenant was given  
to Mr. Barclay for the production of the title deeds. The original deed of  
covenant had since been lost : inquiries had been made for it, but without  
effect, and no hopes were entertained that it would be found. John Thring  
sold his part of the property to Mr. Slade, under whom Messrs. James and  
John Slade, the present proprietors of it, claimed to be entitled. Application  
had been made by the plaintiffs to Messrs. James and John Slade for a new  
deed of covenant to produce the title deeds ; but they refused to give it. It  
appeared that upon the sale by Thring to Mr. Slade, part of the pur-  
chase \*money was secured by a mortgage of the property sold to [\*451]  
Mr. Slade, and the title deeds were, together with the deed of mort-  
gage, lodged in the hands of Mr. Thring, where they still remained. The  
plaintiffs, therefore, applied to Mr. Thring for a covenant to produce the ori-  
ginal title deeds, and Thring accordingly executed a deed of covenant, dated  
the 29th of October 1822, by which he covenanted with the defendant Raine,  
that he would produce the title deeds whilst he should continue mortgagee.  
The defendant Raine objected to this last deed of covenant as insufficient, and  
therefore Thring executed another, dated the 18th of January 1823, by which  
he acknowledged the execution by him of the original deed of covenant of the  
12th of July 1797, and also that the several title deeds mentioned in the  
schedule to the original deed of covenant were, at the date of this last deed,  
in his possession. Copies of these two deeds of covenant, of the 29th of  
October 1822 and the 18th of January 1823, were delivered to the defendant's  
solicitor before the filing of the bill in this cause. But the defendant, when he  
agreed to purchase from the plaintiffs, had no notice that they could not



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deliver the original title deeds to him, or that he was to have a deed of covenant for the production of them, or that they related to other estates.

Under these circumstances, the master stated his opinion to be, that the plaintiffs ought to procure a deed of covenant, to be executed by Messrs. James and John Slade, for the production of the title deeds; and that when such deed of covenant was obtained, the plaintiffs would then be enabled to deliver to the defendant all such muniments and writings as the [\*452] \*defendant appeared to be entitled to receive upon the completion of his purchase. The master, therefore, submitted to the consideration of the court whether, without such a deed of covenant from Messrs. James and John Slade, the defendant ought to be called upon to complete his purchase?

A motion was now made, on behalf of the plaintiffs, that the defendant might be ordered to pay his purchase money into court. This motion was made with the view of obtaining the opinion of the court on the facts submitted by the master.

Mr. *Bell*, and Mr. *Richmond*, for the motion:—Although the original deed of covenant has been lost, yet the purchaser has a covenant from the party who has now the custody of the title deeds to produce them so long as they remain in his possession. Although the mortgagor of the other part of the estate has not joined in this covenant, nor given any other covenant to produce the title deeds, yet the purchaser from the plaintiff would have an equitable right to compel the mortgagor to produce the title deeds. There is sufficient evidence of the existence of the title deeds, and of their relating to the estate in question in this cause. In *Shore v. Collett*,<sup>(a)</sup> where the doctrine of the right to possession of title deeds was carried very far, Lord Eldon seems to have considered that a purchaser, in such a case as the present, would have a right, in equity, to compel the owner of the other part of the estate, who was in possession of the whole estate, to produce the title deeds.

[\*453] \*The expression used by Lord Eldon in *Dare v. Tucker*,<sup>(b)</sup> as to attested copies of deeds being mere waste paper, must be considered as applying only to the inefficacy of attested copies as evidence in ejectment. It was decided in *Townsend v. Ash*,<sup>(c)</sup> that a party who has not established his title at law can by bill in equity compel the production of a deed at all trials at law, and is entitled to have attested copies of it. A covenant to produce title deeds is merely corroborative of the right in equity to compel the party who has the custody of the deeds to produce them. This right to production was recognized in *Buckhurst's case*,<sup>(d)</sup> and in *Banbury v. Briscoe*.<sup>(e)</sup> The principle is, that wherever two parties claim under the same title deeds, the party who has the custody of the deeds can be compelled to produce them, to defend the title of the other party. In *Banbury v. Briscoe*, where two parties claimed under one deed, the court ordered the deed to be delivered into court,

<sup>(a)</sup> Coop. 234.<sup>(b)</sup> 6 Vcs. 460.<sup>(c)</sup> 3 Atk. 336.<sup>(d)</sup> 1 Co. 1.<sup>(e)</sup> 2 Ch. Ca. 42.

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in order that both parties might have access to it, and might take copies of it, It must be admitted that this right to compel the production of title deeds can be exercised only where the party requiring the production shows a clear title, which is not adverse to that of the party in possession of the deeds; but, subject to that qualification, the right is clear. *Amey v. Long,(f) King King. (g)*

Mr. Sugden, for the defendant:—The rule as to covenants for the production of title deeds is, that they run with the land for the benefit of purchasers necessarily, but not for the benefit of vendors. No purchaser can be compelled to take a \*title unless he gets either the title deeds, or [\*454] documents which enable him to obtain the production of the deeds. In the present case, the purchaser has neither the deeds, nor any document to enable him to compel the production of them. The plaintiffs never had any legal covenant for the production of the deeds. Mr. Barclay completed his purchase without taking any legal covenant for the production of the deeds, and the plaintiffs claim through him. As to the general principle which has been insisted upon on behalf of the plaintiffs, and according to which it is contended that there is an equity by which every party who claims through title deeds which relate also to property belonging to another party who has the custody of the deeds, can compel the party who has the custody of the deeds to produce them, it is a doctrine entirely new. And even if there be any expressions in the books to countenance such a doctrine, there is certainly no case in practice in which a purchaser was ever advised to take a title, relying on such general equity, without any actual covenant for the production of the deeds. There are, indeed, cases in which a covenant is taken to produce a covenant for the production of the title deeds. But if a man chooses to buy an estate without having possession of the title deeds, or any covenant with himself for the production of them, it can hardly be expected that a court of equity will compel any person who has agreed to purchase from him, without having any notice of the situation of the title deeds, to complete his purchase without a legal covenant for the production of the title deeds.

The VICE-CHANCELLOR:—A court of equity never compels a purchaser to take without the title deeds, unless he has a covenant to \*pro- [\*455] duce them; and a right in equity to compel the production of the deeds even if it existed, would be no answer.[1] But the equity of the purchaser, in

(f) 9 East, 473.

(g) 4 Taunt. 666.

[1] In a suit by a vendee to rescind a contract, for want of title in the vendor, and calling on him to exhibit his title, the vendor must exhibit the deeds and other writings, if there be any by which he derives title. In such case, the vendor, if he is able, must show a paper, not a parol title. *Met. calf v. Dallah*, 4 J. J. Marsh. (Kentucky) 260. A grantee to whom possession has been delivered, under covenants of title and warranty, has no relief against his grantor, on account of a deficiency or failure of title, unless fraud has intervened. *Denston v. Morris and others*, 2 Edw. 37. That a purchaser will not be compelled to take a defective title, vide ante, 305, n. Amer. Ch. Digest, Vendor and Purchaser, VII, VIII.

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 1823.—*Brassington v. Brassington*.
 

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the present case, would be highly questionable. Thring's covenant to produce does not run with the land; nor is it pretended that Slade had notice of that covenant; and Slade, like every other proprietor, has a material interest against the exposure of his title deeds.[2]

Motion refused.

The bill was dismissed, with costs.

Reg. Lib. A. 1822, fol. 2000.

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BRASSINGTON V. BRASSINGTON.

1823, 27th May.—*Solicitor's lien*.—*Witness*.

A solicitor, who refused to allow a deed in his possession to be proved on behalf of the plaintiff, because he had a lien on it for costs due from the defendant, was ordered to produce the deed at his own expense, and to pay all the costs consequent on his refusal.

THE bill in this cause was filed by Martha Brassington against her husband, William Brassington, to enforce a settlement made by him in her favor, in contemplation of their marriage. The cause being at issue, a commission had issued for the examination of witnesses.

The deed of settlement was in the possession of one Williams, who was solicitor to the executrix of William Harding, the solicitor who had prepared the settlement. Williams was served with a *subpœna duces tecum*, to appear as a witness on behalf of the plaintiff, and produce the deed. He appeared before the commissioners accordingly, and acknowledged that he had the deed in his custody, and exhibited it to the commissioners, but refused to allow it to [\*456] be proved and given in evidence; alleging, as a reason for his refusal, that he held the deed only as the solicitor of Harding's executrix, who claimed a lien in respect of costs due by the defendant Brassington.

The court was now moved, on behalf of the plaintiff, that Williams might be ordered, at his own expense, to produce the deed at the examiner's office, and to pay all the costs occasioned by his refusal.

The certificate of the commissioners before whom Williams had appeared, was read in support of the motion. It stated the refusal of Williams, and the reason which he alleged for it; also, that the acting executor of Harding had attended to prove the execution of the deed, but was prevented by the refusal of Williams to allow it to be given in evidence.

Mr. Rose, for the motion, insisted that the *subpœna duces tecum* was compulsory as to the production of the deed, for the purpose of its being given in

[2] Vide *Fain v. Ayers*, 2 Sim. & Stu. 533. As to covenants running with the land, vide *Kellogg v. Wood*, 4 Paige, 578; *Norman v. Wells*, 17 Wend. 136; *Amer. Ch. Digest*, Covenants, III, *Kepell v. Bailey*, 2 Mylne & Keene, 517; *Van Horne v. Crain*, 1 Paige, 455.

1823.—Brassington v. Brassington.

evidence. It has been expressly laid down by Lord Eldon, that a solicitor cannot, by virtue of his lien, prevent the king's subject from obtaining justice. *Commerell v. Poynton*, (a) *Ross v. Laughton*, (b)

Mr. Pemberton, on behalf of Williams, opposed the motion. This is the case of the representative of a deceased solicitor, who insists on his right to retain this deed against all the world till his demand in respect of costs is satisfied. The utmost length to which the court has gone in cases where such a lien has been claimed is, that where deeds have been \*deposited in the [\*457] hands of a solicitor in the progress of a suit, the court, notwithstanding the lien, will compel the solicitor to produce the deeds for the purpose of that suit. But the present is a different case. The lien of the solicitor is in respect of the costs of preparing the deed under which the plaintiff claims; so that he may be considered as having a claim against both the husband and wife. The purpose for which it is sought to compel the production of this deed would entirely destroy the lien.

The VICE CHANCELLOR:—It would be very extraordinary if a deed by which property is conveyed were to be of no effect, because the party who executed the deed did not choose to pay his solicitor's bill.[1] It may be reasonable that the husband, if calling for the deed for his own purposes, should not have access to it until the solicitor's claim was satisfied; but to refuse to produce it as a witness for the other party cannot be justified. I shall order the deed to be produced, and the witness to pay all the costs occasioned by his refusal.(c)

(a) 1 Swan. 1.

(b) 1 V. &amp; B. 349.

(c) Under a *subpœna duces tecum* the party may, in court, object to produce the documents; but if the objection is overruled, production will be compelled. Per Lord Eldon, *Field v. Beaumont*, 1 Swanst. 209. [Where a person having been served with a *subpœna duces tecum* to produce a deed in his possession for the purpose of being proved by the subscribing witness, but refused; it was ordered that he should produce the deed at his own expense, and pay the expenses of the subscribing witness, and other incidental costs; *Bradshaw v. Bradshaw*, 3 Sim. 285; S. C. 1 Russ. & Mylne, 358.]

[1] Order made on a solicitor who withdrew from the conduct of the plaintiff's cause, that he should deliver up to the plaintiff's new solicitor the briefs of the pleadings, counsel's opinions thereon, office copies of the several answers, and all such other papers and documents connected with the cause, as, upon inspection, such new solicitor might deem necessary for the hearing; without prejudice to any right of lien for costs, and upon an undertaking to return them undefaced within ten days after the hearing; *Heslop v. Metcalfe*, 3 Myl. & Cr. 183. If a solicitor whom his client has ceased to employ, by the production of a deed in his hands belonging to the client, upon which he claims a lien as solicitor, enables the client to recover a fund in a suit, his lien over the fund so realized is confined to the costs of that suit, but is a lien which he is entitled actively to enforce: it is otherwise as to his general lien upon his client's papers, which applies to all his bills of costs, but is merely a right to retain the papers, and cannot be actively enforced; *Boxon v. Bolland*, 4 Myl. & Cr. 354. A client deposited with his solicitor the title deeds of an estate to secure a sum of money then due, and certain costs then incurred; the court on the petition of the client, ordered the deeds to be delivered up to the client, on his paying into court a sum sufficient to cover the solicitor's claim, and directed the usual taxation; *Mills v. Finley*, 1 Beav. 560. "I cannot see how there can be any sound distinction between the case of a solicitor claiming a lien on the papers of his

1823.—*Loomes v. Stotherd.*

"This court doth order, that the said John E. Williams do attend and produce, at his own expense, before J. N. Dancer, one of the examiners of this court, at the examiner's office, when he shall appoint, the marriage settlement of William Brassington and Martha his wife, dated the 7th of December 1807. And it is \*ordered, that the subscribing witness, or one of the subscribing witnesses, to the said deed do attend before the said examiner at the time and place aforesaid, at the expense of the said J. E. Williams; and that the said J. E. Williams do pay the costs of preparing and filing interrogatories consequent on this application, and also the costs of this application; and incident thereto, to be taxed by Mr. Alexander, one of the masters of this court."

Reg. Lib. A. 1822, fol. 1331.

*LOOMES v. STOTHERD.*1823, 13th March and 16th July.—*Retainer.*—*Devisee.*

A devisee has a right to retain a debt due to himself, or to his trustee, out of the produce of the estate devised to him.

THE plaintiff was the personal representative of Robert Loomes, and the defendant was the executrix and devisee of all the real estates of John Richard Stotherd, her late husband. The object of the bill was, to have certain specialty debts, due from Stotherd to Loomes' estate, paid out of the real and personal assets of the former.

The master had reported that 1,674*l.* 3*s.* 9*d.* were due from Stotherd's estate to the trustees of his marriage settlement upon a bond for securing 2,500*l.* for the benefit of the defendant and her children. Stotherd's personal estate being insufficient to pay his debts, the defendant claimed to retain the 1,674*l.* 3*s.* 9*d.* out of the money to be produced by sale of his real estates, before the plaintiff's demands were satisfied; and, on the cause coming on for further directions, the question was, whether she had any such right of retainer.

[\*459] \*Mr. Hart, and Mr. Wakefield, for the plaintiff:—Although it is settled that an executor has a right to retain for his own debt, the heir has no such right: *Shutehworth v. Neville*.<sup>(a)</sup> But admitting that the

(a) 1 T. R. 454.

client, and the case of any other creditor who holds a security for his debt. It was suggested at the bar, with reference to the case of *Mills v. Finlay*, that the existence of a special contract could make a difference; but there is, in fact, no ground for such a distinction. Liens existing by the custom of trade, or the practice of a profession are equivalent to contracts; and I know of no distinction in the law of lien, between that of a solicitor, and that of any other party;" Lord Cottenham, *Richards v. Platel*, 1 Cr. & Ph. 82: See further, *Colgrave v. Manley*, Turn & Russ. 400; *Lord v. Wormleighton*. Jac. 560; *Meir v. Mudie*, ante, 282.

1823—Loomes v. Stotherd.

heir is entitled to retain, it would not follow that this defendant had the same right; for she is not the heir, but the devisee; and she takes the estate subject to the payment of debts. The reason for allowing an executor to retain is, that he cannot sue himself. But here the debt is not due to this defendant, but to a third person; and therefore the principle does not apply. And it appears from the case of *Wilson v. Knubley*,<sup>(b)</sup> that the statute<sup>(c)</sup> places the heir and devisee in different situations, and under different obligations. Suppose the plaintiff had brought an action at law against the defendant, what plea could the latter have pleaded? Could she have pleaded that the testator was indebted by bond to her trustee, and that she was entitled to retain the debt? She never could interpose her power of retainer against the power given by the statute.<sup>(c)</sup> If, then, there is no retainer at law, and the heir or devisee comes into a court of equity to assert his right, it would be contrary to the principles of such a court to give him a preference over all the other creditors. The utmost that a court of equity would decree would be, a rateable satisfaction with the other creditors.

Mr. Bell, and Mr. Garrat, for the defendant:—An executor may not only retain for a debt due to himself, but also for a debt due to his trustee. *Loane v. Casey*,<sup>(d)</sup> *Frañks v. Cooper*.<sup>(e)</sup> And an heir at law can no [\*460] more bring an action against himself than an executor can; and therefore he may plead retainer for his own debt, in an action brought against him to recover a debt due from his ancestor.<sup>(f)</sup> The statute of fraudulent devises enacts,<sup>(g)</sup> that, in all cases where any heir at law shall be liable to pay the debt of his ancestor in regard of any lands, tenements or hereditaments descending to him, and shall sell, alien or make over the same before any action brought, or process sued out against him, such heir at law shall be answerable for such debt or debts in an action or actions of debt, to the value of the said land so by him sold, aliened or made over; in which cases all creditors shall be preferred, as in actions against executors and administrators, and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts, saving that the lands, tenements and hereditaments *bona fide* aliened before the action brought shall not be liable to such execution. What is intended by this section is, that, if the heir aliens before the action brought, he shall have the same preference as an executor is entitled to; so that the right of retainer by the heir is acknowledged by this statute. And the seventh section enacts, that all and every devisee and devisees made liable by this act, shall be liable and chargeable in the same manner as the heir at law by force of this act, notwithstanding the lands, tenements and hereditaments to him or them devised shall be aliened before \*the [\*461]

(b) 7 East, 128.

(c) 3 W. & M. c. 14.

(d) 2 Black 965.

(e) 4 Ves. 763.

(f) Com. Dig. tit. Pleader, 2 E. III. and 2 Vern. 62.

(g) 3 W. & M. c. 14, sect. 5.

1823.—*Partridge v. Cann.*

thereafter arise, from the 4,211*l.* 12*s.* 3*d.* (b) three per cents. then standing in the accountant general's name, in trust in the cause, as would, with the sum of cash, be sufficient to pay the half yearly payment of her annuity then due to her; and also, out of the dividends of those two sums of stock, to pay the annuity to her, from time to time, during her life.

Mr. *Rose*, for the petitioner.

[\*465] \*Mr. *Bell*, and Mr. *Wilbraham*, for the other persons interested in the residue of the personal estate, contended that the petitioner was not entitled to have the deficiency of the fund, which had been set apart for payment of her annuity, supplied out of any other fund in the cause; because she had consented to the 4,000*l.* five per cents, being appropriated for securing her annuity; and that she must, therefore, abide by the loss occasioned by the conversion of the five per cents.

The Vice-Chancellor said, that the appropriation of the 4,000*l.* five per cents, was not the act of the petitioner, but was the act of the court; and that, as the annuity was a charge upon the whole of the residue, the petitioner was entitled to have the deficiency, which had been occasioned by the conversion of the stock, supplied out of the other funds in the cause; and he made an order according to the prayer of the petition.[1]

Reg. Lib. A. 1822, fol. 2315.

[\*466]

\**PARTRIDGE v. CANN.*

1823, 27th and 30th May.—*Practice.*

A cause may be regularly set down, without consent, in the vacation after the term in which publication passes.

THE rule to pass publication in this cause expired on the 12th of May, which was the last day of Easter term. A few days afterwards, during the vacation after the term, the plaintiff obtained the six clerk's certificate that publication had passed, and obtained also the usual order for setting down the cause, and served the subpœna to hear judgment.

The court was now moved, on behalf of the defendant, that the subpœna to hear judgment might be discharged, with costs, and the cause struck out of the register's book for irregularity.

Mr. *J. Martin*, for the motion, relied on the case of *Lord v. Genslin*, (a) which decided that a cause cannot be set down in the same term in which pub-

(b) This was the remainder of the 4,849*l.* 14*s.* 8*d.* after payment of the costs of the suit, down to the time of the decree on further directions.

(a) 5 Madd. 83.

[1] For other cases in which a deficiency, arising from a conversion of stock, was made good, see *May v. Bennett*, 1 Russ. 370; *Arundell v. Arundell*, 1 Mylne & Keene, 316.

1823.—*Piggott v. Croxhall.*

lication passed ; and insisted, that the short vacation after Easter term must be considered as part of the term ; and that the same inconveniences, which it was intended to prevent by not allowing the cause to be set down during the term in which publication passed, would happen by allowing the cause to be set down during the short vacation after the term.

Mr. *Beames*, for the plaintiff, opposed the motion, and cited 1 *Turner's Prac.* 92, ed. 1810, and *Gilbert For. Roman.* 152.

The Vice-Chancellor observed, that the reason why a cause cannot be set down to be heard in the term \*in which publication passes, un- [\*467] less by consent, was, that it might come on to be heard during that same term, and when the defendant could not conveniently be prepared ; but that reason did not seem to apply to setting down the cause during the vacation after the term.

The motion was ordered to stand over, that the practice might be inquired into.

The Vice-Chancellor said, the register, upon inquiry, found that a cause might be regularly set down, without consent, in the vacation after any term in which publication had passed.

Motion refused, with costs.

#### PIGGOTT V. CROXHALL.

1823, 14th June.—*Practice.*—*Articles to discredit witnesses.*

There is no precise time beyond which witnesses cannot be discredited.

Interrogatories in support of articles for that purpose may relate to particular facts not in issue in the cause, as well as to the credit of the witnesses generally.

THIS was a motion on behalf of the plaintiffs, for liberty to exhibit interrogatories for the examination of witnesses in support of articles which had been exhibited in the six clerk's office, to discredit some of the defendant's witnesses ; on the ground that, previous to their examination they had made declarations contrary to their depositions.

Mr. *Russell*, in support of the motion, cited *Purcell v. Macnamara*, (a) *Wood Hammerton*, (b) *Carlos v. Brook*, (c) *White v. Fussell*, (d) *Russell v. Atkinson*, (e) and *Watmore v. Dickinson*. (f)

\*Mr. *Lynch*, contra, said, that the depositions had been published [\*468] so long ago as Michaelmas term, and that the court would not allow these interrogatories to be exhibited after so much delay had taken place. He also contended, that the object of the plaintiffs was to re-examine as to

(a) 8 Ves. 324.

(d) 19 Ves. 127.

(b) 9 Ves. 145.

(e) 2 Dick. 532.

(c) 10 Ves. 49.

(f) 2 V. & B. 267.



1823.—Trim v. Baker

matters in issue in the cause, which was not allowable; and he cited *Gill v. Watson*,<sup>(g)</sup> and *Anon.*<sup>(h)</sup>

**THE VICE-CHANCELLOR:**—There is no precise time within which the examination as to credit is to take place. The court will take care that the hearing of the cause is not unreasonably delayed; and no such delay will be occasioned here. I incline to think that the party may prove that the witnesses made the declarations which they denied upon their cross-examination; and that the fact of these declarations is not material to the issue in the cause.

Let him take the usual order to examine, by general interrogatories, as to the credit of the witnesses, and upon such particular facts only as are not material to what is in issue in the cause. If he examine to other facts, the defendants must move to suppress the depositions.[1]

Reg. Lib. B. 1822, fol. 1278.

[\*469]

\*TRIM v. BAKER.

1823, 28th June.—*Practice.*

After a demurrer overruled, an order for time to answer merely can be obtained by a special application only.

THE defendants had demurred to the bill. On the 11th of this month the demurrer came on to be argued, and was overruled. Five days afterwards an order was obtained, upon a motion of course, that three of the defendants should have a month's time, and the other defendants, who lived above twenty miles from London, six weeks' time, to answer the bill.

Mr. Romilly, for the plaintiff, now moved that that order might be discharged for irregularity, with costs. He said that, after a demurrer overruled, an order for time to answer could not be obtained upon a motion of course, but that a special application must be made for it; and he cited *Jones v. Saxby*.<sup>(a)</sup>

Mr. Lovat, for the defendants:—The case cited for the plaintiff has no application; for there the order was for time to plead, answer or demur, not demurring alone; and the order was discharged, because a defendant is not at liberty to put in a second demurrer without the leave of the court. Here the order is for time to answer only. In *Griffith v. Wood*,<sup>(b)</sup> an order for a month's time to plead or answer, after a demurrer overruled, was made upon a mo-

(g) 3 Atk. 522.

(h) 3 V. & B. 93.

(a) 1 Swan. 194, n.

(b) 1 V. & B. 541.

[1] At law the credibility of a witness can only be impeached by inquiry as to his general character; but in chancery it is permitted to discredit a witness by falsifying matters stated by him, on examination, provided those matters are not material to the issue in the cause. The reason of the restriction is, that after publication has passed, a party shall not be permitted indirectly, to produce evidence affecting the merits of the case, which he is not allowed to do directly. *Troup v. Sherwood*, 2 Johns. Ch. Rep. 559.

1812.—Harrison v. Hollins.

tion of course. And it is laid down by Mr. Maddock, upon the authority of an anonymous case of the 30th June 1807,(c) that a defendant, after demurrer overruled, is entitled to the usual orders for time to answer.

\*Suppose there were only one or two interrogatories in the bill [\*470] which the defendant could be compelled to answer, he might, if a special application was necessary, be forced to make a discovery which would subject him to penalties. His situation may be such that he cannot make a special application; and then he would be immediately subject to process of contempt. I submit, therefore, that, upon principle as well as authority, this order is proper.

The Vice-Chancellor said that, after a demurrer had been overruled, it was not of course to obtain an order for time even to answer only; but that it must be made the subject of a special application: and he discharged the order, with costs.(d)

Reg. Lib. B. 1822, fol. 1223.[1]

\*HARRISON v. HOLLINS.(a)

[\*471]

1812, 24th February.—*Equity of Redemption.*

If a mortgagee enters in the lifetime of the tenant for life of the mortgaged estate, the remainderman will be barred of his right to redeem after twenty years from such entry.

By an indenture, dated the 28th of May 1781, and made between Randle Harrison, of the first part; William Harrison, of the second part; and Nathaniel Hall, and Sarah Hall, his wife, and Margaret Hall, spinster, of the third part; Nathaniel Hall, for the love and affection which he had for Margaret Hall, his daughter, and in consideration of an intended marriage between her and William Harrison, did, for himself, his heirs, executors and administrators, covenant with William Harrison, his heirs, executors, administrators and assigns, that, in case the marriage should take effect, he would, by proper conveyances and assurances in the law, or by his last will and testament in writing, settle and give all such personal and real estate as he then was, or at the time of his death should be seized or possessed of, or anywise entitled unto, or

(c) 2 Prin. & Prac. 363.

(d) The usual practice is, to apply for an order for time to answer immediately after the demurrer has been overruled: and the court will grant the application in the vacation, as well as in term time. *Adderley v. Dixon*, 16 January 1824.

(e) This case is mentioned, ante, p. 354, as having been cited from a MS. note in the possession of Mr. Shadwell. As that note is a very short one, and as the register's book merely contains the order for dismissing the bill, we thought it would not be unacceptable to the profession to be furnished with a full statement of the case; which we have been enabled to give from the pleadings, by the kindness of the solicitor who was employed for the plaintiffs in the cause.

[1] Affirmed, 1 Turn. 253.

1823.—Harrison v. Hollins.

have any power to dispose of, (subject to the maintenance and subsistence thereof, during his life, of himself, his wife and family, and also subject to and after payment of his just debts and funeral expenses,) so that the same respectively should, from and after his decease, go and remain to the uses and [\*472] for the purposes therein \*and hereinafter mentioned concerning the same; (that is to say,) to the intent that the clear rents and profits, interest and produce, of so much of such real and personal estate, as should remain after what should have been applied for the purposes aforesaid, should and might be received by William Harrison for so long as he, after the decease of Nathaniel Hall, should happen to live; and after his decease, then by Margaret Hall, for so long as she should thenceforth happen to live; and after the decease of the survivor of them, to the intent that all such residuary real and personal estate should go and be enjoyed by all and every such one or more of the children of the said William Harrison, on the body of the said Margaret, his intended wife, to be begotten, and in such parts and proportions, manner and form, as Margaret Hall, notwithstanding her coverture, by any writing or writings executed by her as therein mentioned, or any writing purporting to be her last will and testament, to be by her signed, sealed and published as therein mentioned, should direct or appoint.

The marriage between William Harrison and Margaret Hall took effect soon after the execution of the settlement. There was issue of the marriage Randle Harrison, and the plaintiffs Eli Harrison and Ann Gent.

In April 1764, Nathaniel Hall agreed to purchase a farm at Lowe, in the parish of Leek, in Staffordshire, for 880*l*.; but not having sufficient money to pay for it, he borrowed 600*l*. of Richard Dale for that purpose. And by indentures of lease and release, dated the 4th and 5th days of April 1764, the farm was, by Hall's direction, mortgaged to Dale in fee, for securing [\*473] the \*600*l*. and interest. Hall's real estates were never conveyed to the trustees of the settlement.

In 1768, Dale, by Hall's direction, conveyed the farm to one Dickenson, for securing a sum of money, the amount of which was not stated in the pleadings.

Hall survived his wife, and died in 1770, intestate, and in possession of the farm, leaving Margaret Harrison his only child. Upon Hall's death Harrison entered into the possession of the farm. In May, 1772, Dickenson, by the direction of Mr. and Mrs. Harrison, conveyed the farm to Thos. Harwar, in trust for Esther Gallimore, to secure 1,000*l*. and interest. Esther Gallimore afterwards died, having appointed Thomas Harwar her executor; and in 1779 he entered into the possession of the farm under the conveyance of May, 1772.

Margaret Harrison, by her will, dated the 29th March, 1793, and (which was executed pursuant to the power given to her by the settlement) after reciting that she was enabled by the settlement to make a will of her real estate and

1812.—Harrison v. Hollins.

effects, did by virtue of the settlement, give and devise the farm to Randall Harrison and the plaintiff Eli Harrison, and their heirs, equally share and share alike, subject to the payment of an annuity of 20*l.* to the plaintiff Ann Gent, for her life.

Randle Harrison died in his father's lifetime, having devised the whole of his real estates to the plaintiffs, Eli Harrison and Ann Gent, in fee. In April, 1804, William Harrison died.

In 1795, Thomas Harwar died; and, upon his decease, Joseph Harwar entered into the possession of the farm as Thomas Harwar's heir at law.

\*Joseph Harwar afterwards died, having devised all his real estates [\*474] in the county of Stafford to the defendants Faulkener and Vaudry in fee; and having appointed them and his brother, Charles Harwar, his executors. Faulkener and Vaudry entered into possession of the farm upon Joseph Harwar's decease, and have ever since continued in possession thereof.

The bill was filed in April, 1809; and it prayed that all the plaintiffs might be at liberty to redeem the mortgaged premises, and that the usual accounts might be taken of the principal and interest due on the mortgage, and of the rents and profits received by Thomas Harwar and those who claimed under him.

The defendants, Faulkener and Vaudry, in their answer, said, that they, and Thomas Harwar, and Joseph Harwar had been in the peaceable possession of the premises from the year 1799, being a period of thirty years and upwards, and had not, during that time, to their knowledge or belief, being called on to account for the rents and profits of the mortgaged premises by any person claiming to be entitled to the equity of redemption thereof, until the filing of the bill, or a short time previous thereto; and therefore they submitted, that they ought not to be compelled, at such a distance of time, to set forth any account of the rents and profits received by them from the mortgaged premises, but that the plaintiffs were, by length of time barred from redeeming the mortgaged premises.

John Hollins, and William Hollins, the other defendants, were interested in the premises under a mortgage made by Thomas Harwar, 1784, for securing 500*l.*, which he had borrowed as the executor of Mrs. Gallimore.

\*"Monday, 24th February 1812." [\*475]

"This cause coming on on the 11th and 12th days of December 1811, and on this present day to be heard before the right honorable the master of the rolls, in the presence, &c. his honor doth order, that the plaintiffs' bill do stand dismissed out of this court, with costs, to be taxed, &c."

Reg. Lib. A. 1811, fol. 374.[1]

[1] Vide ante *Price v. Copner*, 347; *Ashton v. Milne*, 6 Sin. 369.

## CASES IN CHANCERY

BEFORE THE

## THE VICE-CHANCELLOR.

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[\*477]

\*TROLLOPE v. LINTON.

1823, 10th and 11th November.—*Power.—Settlement.*

By articles for settlement of the wife's real and leasehold estates, the husband had power to appoint her estates to the children of the marriage, for such estates, and in such parts, and in such manner and form as he should by deed or will appoint; and, by other articles of the same date, for the settlement of his own real estates, he had an absolute power of appointment over them by deed or will, in default of issue of the marriage. There being several children of the marriage, and no settlement pursuant to the articles, the husband, (who died in the lifetime of the wife,) by his will, recited the articles for the settlement of his own estates, and confirmed them, and recited the power of appointment in them at length, mentioning it as a power intended to be exercised by that his will; and thereby, in exercise of that power, and all other powers, appointed his own real estates, and all other real estates over which he had power, to trustees for a term of 500 years, upon trust, to raise portions for his younger children, making no mention, in any part of his will, of the articles for settlement of his wife's estate; but directing, that all persons taking any benefit under his will should be bound by the doctrine of election to give effect to every disposition contained in it. Held, that the will operated as an appointment of the wife's real estates; and that the creation of the term of 500 years was a good execution of a power to appoint for such estates as the appointor should think fit; and that the words "in such manner and form" authorized him to give equitable interests to the children.

Articles of settlement of the chattels real of an infant on her marriage, will bind her and her husband; and, although no settlement be made pursuant to the articles, the wife is not entitled to any interest by survivorship.

By articles of agreement, dated the 24th of March 1798, made previous to the marriage of Sir John Trollope with Miss Ann Thorold, it was [\*478] covenanted that the real estates of that lady should be settled, in \*consideration of the marriage, to the use of Henry Thorold, her father, for his life; with remainder to trustees to preserve contingent remainders; with remainder to Sir John Trollope for his life; with remainder to trustees to preserve contingent remainders; with remainder to Miss Thorold for her life; with remainder to trustees to preserve contingent remainders; with remainder to the use of such one or more of the children of Sir John Trollope on her body to be begotten, for such estate or estates, in such parts, shares and

1809.—*Trollope v. Linton.*

proportions, and in such manner and form, as Sir John Trollope, by deed or will, should direct or appoint; and, in default of appointment, to the children equally as tenants in common in tail, with cross-remainders in tail; with remainder to such uses as Miss Thorold should in manner therein mentioned appoint; and, in default of such appointment, to Sir John Trollope, his heirs and assigns. It was also covenanted that certain leasehold estates, to which Miss Thorold was entitled, should be settled to the same uses, so far as the rules of law and equity would admit.

By other articles of agreement of the same date, and made on the same occasion, it was covenanted, that in case the marriage should take effect, the real estates of Sir John Trollope should be settled and conveyed to trustees, to the use of Sir John Trollope for his life; \*with remain- [\*479] der to trustees to preserve contingent remainders; and, after the decease of Sir John Trollope, to the intent that his intended wife should receive a rent charge for her jointure in bar of dower; with a limitation to trustees for a term of ninety-nine years, upon trust to secure this jointure, and subject thereto to the use of the first and other sons of the marriage in tail male; and, for default of such issue, to the use of such person or persons, for such estate and estates, and in such parts and proportions, and for such intents and purposes, and in such manner and form, as Sir John Trollope should, by deed or will, appoint; and, in default of appointment, to William Trollope, his brother, in tail; with the ultimate remainder to Sir John Trollope, his heirs and assigns.

Soon after the execution of these articles of agreement, the marriage between Sir John Trollope and Miss Thorold took place. Miss Thorold was then an infant; but her father was a party to the articles. No settlement was executed pursuant to the articles. Sir John Trollope by his will, dated the 24th of March 1809, directed that the trustees named in his will should permit his wife personally, with her own family, to occupy the mansion-house on his estate, during her life, or until some one of his sons should attain the age of twenty-one; and, after reciting the articles for the settlement of his own estates and the power of appointment thereby reserved to him, which he described as "a power intended to be exercised by this my will;" and also reciting "that no settlement had been made pursuant to the said agreement;" he thereby expressly confirmed the agreement, and directed that it should be performed. He then, (without mentioning in any part of the will the articles of \*agreement for the settlement of his wife's estates,) devised [\*480] to his wife part of the property comprised in the articles for the settlement of her estates, without mentioning that it was comprised in those articles: and then he gave and devised, by virtue of every power enabling him in that behalf, all the estates comprised in the articles for the settlement of his own estates, and all other the manors, hereditaments and real estate, both freehold and copyhold, belonging to him, or over which he had a power of appointment, to the use of trustees, for a term of 500 years, upon certain

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trusts for raising the sum of 5,000*l.* as a portion for each of his younger children ; and, subject thereto, he gave all his estates to such uses and trusts, and with such powers "as, by the said articles of agreement of the 24th of March 1798, are limited and declared, or as near thereto as circumstances will admit." The will also contained the following clause: "And I direct that all persons claiming any benefit under this my will shall, under the doctrine of election, be bound to give effect to every disposition and direction herein contained."

After the marriage, and before the execution of his will, Sir John Trollope purchased real estates, which were conveyed to the usual uses to bar dower. Sir John Trollope died in 1818, leaving his widow and several sons and daughters surviving.

The bill was filed by the younger children against their eldest brother, their mother and the trustees. It prayed that the will might be established and the trusts of it performed, under the directions of the court ; that the interest of the portions might be raised and applied for the maintenance and [\*481] education of the plaintiffs until the portions became payable ; and, inasmuch as the testator had executed no appointment of the estates comprised in the articles of settlement of his wife's estate, that it might be declared that the plaintiffs were entitled to those estates equally with their eldest brother, as tenants in common in tail general, according to the limitations of the articles.

Lady Trollope, by her answer, elected to take her own real estates, and to give up the jointure and other provisions made for her by the will.

The cause now came on to be heard ; and the three following questions (among others) arose for the decision of the court :

1st. Whether the will operated as an appointment of the estates comprised in the articles for the settlement of Lady Trollope's estates ?

2d. Whether the power of appointment mentioned in the articles for the settlement of Lady Trollope's estates, authorized Sir John Trollope to create a term of 500 years in those estates ?

3d. Whether the leasehold estates of Lady Trollope were bound by the uses of the articles for the settlement of her estates, or were vested in her by reason of her having survived her husband ?

Mr. *Bell*, and Mr. *Barber*, for the plaintiffs :—

1st. No mention is made in the will of the articles for the settlement of the wife's estate. The power of appointment mentioned in these articles [\*482] is a power to appoint among the children of the marriage. But, as the will does not mention these articles, the words in the will, "all other the manors, &c. belonging to me, or over which I have a power of appointment," are mere general words, and can never be understood to extend to property over which the testator had no power of appointment, except among his children. The nature of the appointment too is quite inconsistent

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with the power in the articles for settling Lady Trollope's estates, because he appoints the estates, subject to the term of 500 years, to go according to the limitations in the articles of the 24th of March, 1799; meaning thereby clearly the articles for the settlement of his own estates. By these latter articles the estates were limited over to the testator's brothers; whereas, by the other articles, the estates of Lady Trollope were limited, in default of appointment and of issue of the marriage, to such uses as she should appoint. This inconsistency makes it manifest that the appointment by the will does not extend over the estates comprised in both the articles, but is confined to the articles for the settlement of his own estates, and does not extend to those for the settlement of the estates of Lady Trollope.

2d. A power to appoint among children in such parts, shares and proportions, and in such manner and form as the appointor shall direct, cannot be considered as exercised by an appointment to trustees for a term of years upon trust to raise sums by way of portions for the children.

*Mr. Hart, and Mr. Pemberton*, for the defendant Lady Trollope.

*Mr. Trollope* for the trustees under the will.

\**Mr. Lovatt* for the defendant Sir John Trollope, the eldest son of [\*483] Sir John Trollope the testator:—

1st. The words used in the will are sufficient to comprise the estates in both articles of settlement. The testator must be supposed to have intended to dispose of all his property by his will; and he must have known that not only his own estates, but the estates of Lady Trollope, had been comprised in articles of settlement executed before the marriage. He must also have known that he had no power to dispose of the mansion house on his estate to his wife, in the manner mentioned in his will, except by the doctrine of election; and on the face of the will itself he has expressed his intention to give effect to it by that doctrine. The will also confirms the articles of settlement of his own estates; he probably taking it for granted that, as he on his part confirmed the articles relating to his own estates, she also on her part would confirm the other articles in which her estates were comprised. The words used in the appointment are enough to include all the estates.

2dly. Even if there should appear to be any difficulty as to the estates comprised in the term of 500 years, there can be no difficulty in seeing that the testator intended the appointment to extend to all the estates over which he had a power of disposal.

3dly. The leasehold estates of Lady Trollope must be held to be bound by the articles, and therefore cannot be considered as being now vested in Lady Trollope by right of survivorship; because, although an infant cannot bind her real estate, yet she may bind her personal estate.

\**Mr. Bell*, in reply:—The case has been argued for Sir John Trol- [\*484] lope on the false assumption, that the words of the will amount to a disposition of the estates of his wife; over which he had a power under the articles of agreement. If it were indeed clear that those estates were affected



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by the will, then it is also clear that there must be an election. But it is the settled doctrine of the court, that there can be no election upon a disposition by implication. No one can be put to election unless it is quite clear that the testator meant to dispose of the property. There must be a clear and manifest intention to dispose of the property. The farthest point to which the court has ever gone, is to admit evidence as to the disposal of the property. *Hinchcliffe v. Hinchcliffe*, (a) The power which the testator had over the estates of Lady Trollope, was a mere power of distribution among the children. He had no power of depriving his wife of her interest in those estates; nor had he any power to give the children less than fee simple interests. The argument founded on the words "all other estates over which I have a power of appointment," is answered by the fact that the testator, at the time when he made his will, had other estates, purchased by him after his marriage, over which he had a power of appointment, by their having been conveyed to the usual uses to bar dower. If the question were between the daughters of the marriage and the brothers of the testator, then the argument on the other side must have been that, having a power to appoint among his children, the testator had well executed that power by an appointment excluding his [\*485] daughters and giving the estate to his brothers. The words, "all the estates over which I have a power of appointment," must be construed to mean, over which I have power to appoint to the uses hereinafter mentioned. *Tibbitts v. Tibbitts*, (b) and *Green v. Green*, (c) are cases in which the principle that there can be no election by implication was clearly recognized by the court.

The Vice-Chancellor held, that the circumstances of the testator having recited the power of appointment over his own estate in *hæc verba*, and yet made a disposition inconsistent with that power, and the expression that all persons claiming any benefit under his will should be bound by the doctrine of election to give effect to all the dispositions in his will, afforded evidence of intention against the argument for excluding the wife's estate from the operation of the power. [1]

His honor also held, that creating a term of 500 years in trustees was a good legal exercise of a power to appoint for such estate or estates, in such parts, shares and proportions, and in such manner and form as the appointor should think fit; and that the words "manner and form," enabled him to give equitable estates to his children.

As to the leasehold estates, his honor held that they were bound by the uses of the articles; because, as to the personal estate, they were the articles of the husband, and not of the wife; and that in this respect there was no differ-

(a) 3 Ves. 516.

(b) 19 Ves. 656.

(c) 19 Ves. 665.

[1] That the intention of the testator is to be effectuated in the execution of a power, vide *Jackson v. Jansen*, 6 Johns. Rep. 73; *Jackson v. Veeder*, 11 Johns. Rep. 169; *Winter v. Beld*, post, 507.

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ence between the personal estate of the wife absolutely vested in possession in the husband, and choses in action and chattels real, which might survive to the wife.

\**MEREST V. COSTER.*

[\*486]

1823, 6th and 14th November.—*Practice.*

An order to dissolve the common injunction *nisi* may be obtained, notwithstanding the defendant has excepted to the master's report as to the sufficiency of the answer.

THIS was a motion to discharge an order for dissolving an injunction, *nisi*, for irregularity, with costs.

The plaintiff had obtained the common injunction for want of an answer. The answer was afterwards filed, and the plaintiff took exceptions to it, some of which were allowed. A further answer was put in, and was afterwards referred back to the master upon the exceptions. The master reported the further answer sufficient; upon which the plaintiff filed exceptions to the master's report, and three days afterwards served the defendant's clerk in court with the order for setting down the exceptions to be argued. On the following day, the defendant obtained the order *nisi* for dissolving the injunction.

Mr. *Wakefield*, in support of the motion:—The taking of exceptions to the master's report stays all proceedings in the cause until the exceptions are disposed of; therefore, the obtaining of the order *nisi*, pending these exceptions, was irregular.

Mr. *Wingfield* and Mr. *Glyn*, contra:—For the purpose of dissolving the injunction, the master's report is, *prima facie*, sufficient. It would be endless if all these processes are to be gone through before a defendant can proceed at law. *Corson v. Stirling*; (a) *Scott v. Mackintosh*; (b) *Bishton v. Birch*; (c) \**Vipan v. Mortlock*; (d) *Raphael v. Birdwood*; (e) *Botham* [\*487] v. *Clark*. (f) The principle to be extracted from these cases is that, so far as regards the dissolving of an injunction, it is indifferent whether the exceptions are filed before or after the order to dissolve has been obtained.

The Vice-Chancellor held, that, as to the matter of the injunction, the exceptions made no difference; and that the court would, for that purpose, act upon the master's report as if no such exceptions had been taken: that otherwise, the question of injunction might be suspended until the propriety of the master's report, having been discussed in the two courts below, had received the final judgment of the house of lords.[1]

(a) *Coop.* 93.

(d) 2 *Mer.* 476.

(b) 1 *V. & B.* 503.

(e) 1 *Swan.* 228.

(c) 2 *V. & B.* 40.

(f) *Cox*, 428.

[1] Exceptions to an answer are no ground against dissolving an injunction, unless they affect the answer in those points on which the injunction rests, and are not frivolous; *Doe v. Roe*, *Hopk.* 276; *Noble and others v. Wilson and others*, 1 *Paige*, 164; *Smith v. Thomas*, 2 *Devereux & Battle*, (No. Car.) 126.

1823.—*Haig v. Swiney.*

## HAIG v. SWINEY.

1823, 11th November.—*Will.*

A bequest of stock to trustees, upon trust, to pay the dividends from time to time to a married woman, for her separate use is an unlimited gift of the dividends, and consequently passes the capital.

ANN HIRST, by her will, bequeathed to two trustees and the survivor of them, the sum of 9,000*l.* four per cent stock upon trust that they and the survivor of them should apply and dispose of the interest and dividends thereof, as the same should from time to time arise and be received, into the hands of her adopted child Maria, the wife of James Haig; or otherwise to permit and suffer her to receive the same for her own sole and separate use and benefit, to the intent that the same might not be at the disposal of, or subject or liable to the control or engagements of her present or any after-taken husband.

[\*488] \*In a subsequent part of the will, the testatrix gave and bequeathed to the same lady, "over and above the 9,000*l.* stock before bequeathed to her," all her plate, whether real or plated, for her natural life; and, after her decease, her will was, that it should go to her daughter, Ann Hirst Haig; and the testatrix also gave to the same Maria Haig her gold watch, case, and chains, with all her rings and trinkets, of what sort or kind soever, and likewise all her wearing apparel.

The testatrix made several codicils to her will. One of them contained the following bequest:

"I give and bequeath to John Swiney, Esq. and J. J. Whittington, Esq. all my chest of plate, in trust and for the sole use of Maria Haig, the wife of James Haig, Esq. without the control of the said James Haig, Esq. her present husband, or any after-taken husband, and not to be liable to any debts that he has or may at any time contract, and over and above what I have before bequeathed."

The bill was filed by Mrs. Haig, praying that it might be declared, that she took an absolute interest in the 9,000*l.* four per cent stock, bequeathed to her separate use.

The cause now came on to be heard.

Mr. *Heald* and Mr. *Gregg* for the plaintiff:—The only question is, whether, where personal property is bequeathed to a party without more words, [\*489] an absolute interest is not given. *Elton v. Shephard*, (a) \*is the same with this case, except merely as to the words, "into the proper hands." The same construction prevailed in *Adamson v. Armitage*; (b) and in *Page v. Leapingwell*; (c) Sir William Grant held, that an indefinite gift of the dividends gives the absolute property in the stock. *Stretch v. Watkins*, (d) *Clough v. Wynne*, (e) and *Gardiner v. But*, (f) are other cases to the same effect.

(a) 1 Bro. C. C. 532.

(b) 19 Ves. 415.

(c) 18 Ves. 467.

(d) 1 Madd. 253.

(e) 2 Madd. 188.

(f) 3 Madd. 425.

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Mr. *Bell* and Mr. *Pepys* for the trustees:—In *Adamson v. Armitage*, there was an absolute gift of the principal in the first instance; and the decision amounted only to this: that directing the executors to vest the principal in trustees, who should pay over the income to the sole use of the lady, did not cut down the absolute interest which the previous words had given her. In *Elton v. Shephard*, it was merely decided that a gift of the produce of a fund did not mean the annual produce for life; and that words giving an absolute power of appointment did not cut down the absolute interest conferred by the first gift.

Mr. *Phillimore* for Mr. Haig the husband, stated, that he was desirous that his wife should take an absolute interest in the fund for her sole and separate use, as he believed the testatrix so intended it.

Mr. *Heald*, in reply, referred to the words of the codicil as to the gift of plate, which showed that the testatrix knew the difference of expression necessary to give a life estate, and an absolute interest.

\*The VICE-CHANCELLOR:—A general gift of the income arising [\*490] from personal property, is equivalent to a general gift of the property itself; and it makes no difference whether the income be given to the legatee directly, or through the intervention of trustees.

The question in the present case is, whether the gift of the dividends of the 9,000*l.* stock to Mrs. Haig be general or limited. It is argued, that the gift is limited to her life, because the dividends are to be paid into her proper hands, and for her sole and separate use and benefit, a direction which is applicable only to the term of her life. In the case of *Elton v. Shephard*, the direction was, that the trustees were to pay the dividends of stock to Mary Elton, for her sole and separate use, independent of her husband, her receipt alone to be a sufficient discharge for the same; and Lord Kenyon held, that this was an unlimited gift of the stock itself. I cannot distinguish the present case from the case of *Elton v. Shephard*.

There are other parts of this will and codicil which confirm this construction. But I do not rely upon them, considering it more useful to rest the case altogether upon the general principle.[1]

\*HOULDITCH V. THE MARQUIS OF DONEGALL.

[\*491]

1823, 18th and 25th November.—*Practica.—Supplemental bill.*

Where, under an order made in a creditor's suit, a supplemental bill is filed by a creditor, not a party to the original suit, on behalf of himself and all other creditors, to have the benefit of the decree in that suit, the propriety of the order which authorized the creditor to file the supplemental bill cannot be questioned at the hearing of the supplemental cause. When leave is given to file such a bill, the plaintiff in it is entitled to the same decree to have the benefit of former proceedings, as the representatives of the original plaintiffs would have been entitled to on a bill of revivor.

[1] Vide *Benson v. Whittem*, 5 Sim. 22. *Phillips v. Eastwood*, Lloyd & Gould, 270. *Grassick v. Drummond*, post 517. *Heron v. Stokes*, Connor & Lawson, 278.

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1823.—*Healditch v. The Marquis of Donegall*.

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In the year 1799, the defendant being indebted to various persons to a great amount conveyed estates to trustees for the payment of his debts, with power to them to issue assignable debentures to his creditors. In 1802, the personal representatives of a Mr. Jones, who had been a holder of some of the debentures, filed their bill in this court on behalf of themselves and all other creditors of the Marquis of Donegall, against the Marquis and the trustees, for an account and payment of the debentures. The Marquis of Donegall, though named a party to that suit, was out of the jurisdiction of the court.

In 1803, a decree was made referring it to the master to take an account of the debentures charged on the estates. The master made his report on the 10th of August 1804, and on the 31st of October following it was confirmed *nisi*; but it was never confirmed absolutely.

The Marquis of Donegall having come within the jurisdiction of the court, a supplemental bill was filed in April 1807, to have the benefit of all the proceedings against him; and in February 1808 a decree was made accordingly. In 1809 the surviving plaintiff died, and his representatives never proceeded further in the suit; but they instituted a suit for the same objects in the court of chancery in Ireland, which was compromised in the year 1816.

[\*492] \*In 1810, the plaintiffs in the present suit became the owners by assignment of some of the debentures included in the master's report; and in 1818 they filed their bill in the court of chancery in Ireland, against the Marquis of Donegall and the trustees, for payment of the debentures, and for an account.

In his answer to that bill, the Marquis insisted that the plaintiff's debentures had been improperly granted by the trustees in respect of claims which were usurious and fraudulent, and for gaming transactions, and that the plaintiffs were not entitled to the payment of these debentures. That cause was now at issue, and the plaintiffs had proceeded to the examination of witnesses in it.

On the 24th of November 1820, this court was moved, on behalf of the plaintiffs in this cause and of the holders of some of the other debentures, that they, as representing certain of the holders of debentures named in the master's report in the original cause in this court, might be at liberty to file a supplemental bill in that cause, to have the benefit of the decree and other proceedings in it.

No opposition was made to this motion by the representatives of the original plaintiffs. But the Marquis of Donegall opposed it on two grounds; 1st. That one of the debentures had been paid by him; 2d. That the suit in Ireland was pending for the same object.

The Vice-Chancellor overruled these objections; because the first was merely matter of merits in the cause when it should proceed; and because [\*493] the pending of another suit for the same objects in a court of concurrent jurisdiction, could not be pleaded in bar before a decree in such other suit. His honor, therefore, made an order that the plaintiffs should be at liberty to file a supplemental bill, to have the benefit of the former proceedings in this court.

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The plaintiffs filed their supplemental bill accordingly; and the Marquis of Donegall put in his answer to it, stating objections to the validity of the debentures, as being granted for usurious considerations and for sums lost at play, and as being fraudulently obtained by the plaintiffs. The answer also stated the proceedings in Ireland, and insisted that the plaintiffs were not entitled to the benefit of the proceedings in the original cause here, and that the defendant was not bound by the proceedings in this court, but was at liberty to impeach the debentures under which the plaintiffs claimed.

The supplemental cause now came on to be heard.

Mr. Bell, Mr. Wetherell and Mr. Tinney, for the plaintiffs.

Mr. Fonblanque and Mr. Clayton, for the Marquis of Donegall:—

I. No proceedings having been taken in the original cause in this court, since the year 1808, the present plaintiffs come now too late to be entitled to the benefit of the former proceedings in it. Where a cause has been allowed to sleep for so many years, till a period when the evidence by which the claim sought to be established by it may be lost, the most mischievous consequences may ensue from allowing other parties to have the benefit of the previous proceedings.

\*II. The validity of the debentures under which the plaintiffs claim [\*494] has been put in issue in the suit in Ireland, can be tried there. The only reason for the plaintiffs coming to this court is, that they hope under the further proceedings to shelter themselves from all further inquiries as to the validity of these debentures.

Mr. Whitmarsh and Mr. Lube appeared for other defendants, who had assigned their debentures to the plaintiffs.

The VICE-CHANCELLOR:—It is insisted for Lord Donegall that the plaintiffs are not entitled to a decree to have the benefit of the former proceedings here; first, because they come too late; and next, because, being plaintiffs in a suit in Ireland in which the validity of their debentures is expressly put in issue, they think fit to desert that suit in order to have the benefit of the proceedings here, considering that, as the master's report here is in favor of their debentures, all further question upon their validity will be excluded. If Lord Donegall, when the plaintiffs moved for leave to prosecute the original suit, had made the case which he now does instead of merely stating the bare fact of the pendency of the suit in Ireland, it would have appeared to me to be entitled to great attention.[1]

Where a bill is filed by a person on behalf of himself and a class of other persons standing in the same circumstances, and the suit, after decree, abates by his death, or is deserted by him or his representatives, it is almost a matter of course to permit another person reported by the master to be one of that class,

[1] Vide *Solomon v. Wootman*, 9 Dana, (Kentucky) 422; *Embree v. Hennis*, 5 Johns. Rep. 101; *Wales v. Durkin*, 12 Johns. Rep. 99; *Jenkins v. Peepson*, 2 Johns. Cas. 312.

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to take up the proceedings by a supplemental bill.[1] But if it were [\*495] made to appear, upon his application for that \*purpose, that he was actually a plaintiff in another court of concurrent jurisdiction in which the validity of his claim was in issue in the cause, and that the effect of permitting him to prosecute the suit here would be to exclude all question as to the validity of his claim, I think I should hesitate much before I could prevail upon myself to make that order. But the order not having been resisted on this ground, and being made, and the present cause being brought to a hearing under the authority of that order, I am of opinion that I cannot, upon the suggestions in the answer to the suit, enter into the consideration of the propriety of that order; for such, in effect, is the nature of Lord Donegall's case. The plaintiffs having been permitted to file this supplemental bill on behalf of themselves and all other persons of the same class, appear to me to be necessarily entitled to the same decree to have the benefit of the proceedings in the suit as the representatives of Jones, the original plaintiff, would have been if they had proceeded by bill of revivor.

The objection of delay has not great weight in this case. Jones' suit in Ireland, which was for the benefit of the plaintiffs as well as himself, was depending until 1816, and in 1818, the plaintiffs filed their own bill in Ireland. It is to be observed too that, if Lord Donegall has a right to question the original consideration of the debentures, he is not necessarily excluded from that purpose by the present state of the proceedings in this suit; for, inasmuch as the master's report of the debentures has never been confirmed absolutely, it may be open to him, upon a sufficient case, to make such application as may lead to the further investigation of these claims.

[\*496]

## \*HAYNES V. LITTLEFEAR.

1823, 19th November.—*Will.—Construction.*

S. H. bequeathed the dividends of her property in the funds to W. H. for his life, and directed that, after his decease, the principal should be divided amongst his children in the manner after-mentioned: she then gave the children certain sums of money, which would have exhausted the whole of her funded property at the date of her will. Between that time and her death, that property had greatly increased. Held that the executors were entitled to the surplus as undisposed of.

THE three following questions arose upon the will of Mrs. Sarah Haynes:

1st. Whether the children of William Haynes, the testatrix's brother, were entitled to the residue of her personal estate, in proportion to their respective legacies?

2d. Whether Thomas Littlefear, the surviving executor, was entitled to it for his own use? Or,

[1] Vide Story's Eq. Plead, 573, 574.

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3d. Whether it was to be distributed amongst the testatrix's next of kin?

The following is an exact copy of the will, which was written by the testatrix herself:

"I, Sarah Haynes, spinster, of Freeman's Lane, in the parish of St. John's, Southwark, in the county of Surrey, being of sound mind, memory and understanding, do make this my last will and testament, in the manner following (that is to say,) as to such worldly estates, wherewith I am possessed, I dispose of in the following manner: first, I direct that all my just debts and funeral expenses be paid: I give to my brother all my household furniture, including household linen, for his own use; I likewise give to my brother William Haynes all my plate and china for his life: and after his decease, not to be sold, but to be divided between his five children, \*or [\*497] as many as shall be living at that time, and to be kept by them in remembrance of their ancestors: I give to my brother William Haynes, all moneys, dividends of my property that is invested in the public funds in my name, and all other moneys whatsoever or wheresoever that shall be due to me, for his life, and him to receive all dividends as they become due, or to be at liberty to empower to receive for him; and, after his decease, I direct all principal and interest to be divided between his children in the following manner: I give to his son William Watton Haynes, 500*l.*; to John Hardcastle Haynes, 300*l.*; to Robert Haynes, 300*l.*; to Elizabeth Littlefear, 300*l.*; Ann Haynes, 300*l.*; but there shall be no division till after the decease of my brother William Haynes. I likewise nominate, constitute and appoint my brother William Haynes and Thomas Littlefear, gentleman, of Kennington Lane, Surrey, my executors of this my last will writing with my own hand and seal, this sixteenth day of May, in the year of our Lord one thousand eight hundred and twelve."

The testatrix died on the 28th December 1821, leaving her brother William Haynes, and the defendant Thomas Joseph Littlefear, the executors of her will, her surviving.

William Haynes died in January 1822.

At the date of the will the legacies would have exhausted the whole of the testatrix's funded property; but between that time and her death that property had been considerably increased.

\*Mr. Hart, for Mr. Heald and Mr. Whitmarsh, for the legatee:— [\*498] The testatrix, in giving these legacies, meant merely to prescribe the ratio in which her property was to be divided amongst the legatees. In the introductory clause she expresses an intention to dispose of the whole of the property which she might have at her death. *Wilde v. Holtzmeier*. (a) She then gives to her brother all moneys, dividends of her property that was invested in the public funds in her name, and all other moneys that should be

(a) 5 Ves. 811; see particularly page 816.



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due to her, for his life. By the word moneys, she meant every thing that produced dividends to her. The property consisted entirely of stock, except, the furniture and plate, which she bequeaths specifically. She then directs all the principal and interest (by which she meant the *corpus*) to be divided amongst her brother's children in certain proportions, but says that no division shall take place until his decease. It is quite clear, therefore, that she intended that the whole of what she had given to her brother for his life, should be divided amongst his children after his decease. And by the words, "in the following manner," she intended to prescribe the proportions in which the property was to be divided. *Cordell v. Norton.* (b)

The Vice-Chancellor after hearing the arguments for the legatees, expressed a decided opinion against their claim.

[\*499] \*Mr. Sugden and Mr. Norton for the next of kin:—It is impossible for the executors to claim the residue of this testatrix's property. They cannot show any favorable disposition, or any expression of confidence or regard towards them in any part of the will; on the contrary, the testatrix throughout the whole will manifests an intention against their taking any part of her property. In the introductory clause she expresses an intention to dispose of the whole of her property; and, in the next place, she does dispose of it to a certain extent; for she gives it to her brother for his life. In order to defeat the claim of the executors, it is not necessary that a testator should actually dispose of his property; it is sufficient if he shows an intention to give it away from them: as where a blank is left for the name of the residuary legatee.

The VICE-CHANCELLOR:—If this testatrix had foreseen the increase which has taken place in her funded property, she would probably have used different expressions. The court can give effect only to the expressions which she has used. It is plain that she considered that the five legacies would exhaust the whole of her moneys and funded property; but she has not stated what was to become of the surplus, if that should happen not to be the case. And it is no necessary inference that, because she gave 1,700*l.* to three children when she considered this property to be of that amount, she must have intended that the children should take the whole of this property, whatever might be its amount. The surplus of the moneys and funded property after payment of the legacies, is, therefore, undisposed of, and, under the circumstances of this will, belongs to the executors.[1]

(b) 2 Vern. 148. S. C. Prec. Ch. 12, and 1 Eq. Ab. 244, under the name of *Cordell v. Norton*.

[1] Vide 1 Story's Eq. 557.

1823.—*Bescoby v. Pack.*\**BESCOBY v. PACK.*

[\*500]

1823, 19th November.—*Will.*

The words "securities for money," in a will, pass stock in the funds, unless the force of the expression is controlled by the context.

Whether bank stock will pass by the same words? *Quere.*

ONE of the questions in this cause was, whether bank annuities and bank stock passed in a will under the description of securities for money.

Mrs. Mary Kerby, after devising her real estates, and bequeathing certain specific legacies, gave to her niece Catharine Bescoby, such of her furniture and effects as should be expressed in any codicil or paper writing signed by her, and annexed to her will, or found therewith; and she gave to her nephew Richard Pack, all her other personal estate and effects whatsoever, except moneys and securities for money, and clothes; and she gave all her moneys and securities for money, and all moneys which should be due to her at her decease, to T. S. W. Samwell, and W. H. Kilpin, and her nephew Richard Pack, upon trust, to pay thereout certain pecuniary legacies, and to place out the residue upon good securities, and pay the interest thereof to her niece Catharine Bescoby, for her life, and, after her decease, to pay the principal amongst all her children.

The testatrix died possessed of considerable sums of bank annuities and bank stock, besides other personal estate.

The bill was filed by the children of Francis and Catharine Bescoby, against Richard Pack, the executors, three of the legatees, and Francis and Catharine Bescoby; and it prayed that the trusts of the will might be carried into execution, and that the usual accounts might be taken of the testatrix's personal estate.

\*Mr. *Horne* and Mr. *Keene* for the plaintiffs, contended, that the [\*501] bank annuities and bank stock did pass under the description of securities for money; and cited *Dicks v. Lambert*.(a)

Mr. *Heald*, for the defendants Mr. and Mrs. Bescoby.

Mr. *Bell* and Mr. *Beames* for the defendant Richard Pack.(b)

THE VICE-CHANCELLOR:—Whether stock in the public funds will or will not pass under the expression of securities for money, depends upon the context of the will. If there be nothing in the will to control the force of that expression, I am of opinion that public stock will pass by it; and there is nothing in this will to control it.

It is argued that bank stock stands upon a different ground, and is nothing more than a description of the proportion in which the proprietor is interested, as a partner, in a public trading company. Before I can come to any conclusion upon this point, I must have the case very fully argued, and the several

(a) 4 Ves. 725.

† (b) The arguments related principally to the operation of a codicil upon the residuary clause in the will, as to which we did not think it advisable to report the cause.

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 1823.—*Revett v. Harvey.*


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statutes which apply to the bank of England carefully considered. The question is too important to be disposed of superficially.

The cause was not mentioned again.[1]

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[\*502]

\*REVETT v. HARVEY.

1823, 20th November.—*Guardian*.—*Infant*.—*Account*.

A solicitor, who advanced money to an infant for the subsistence of himself and his family, and acted as his confidential adviser, is in the nature of a guardian to him; and an account settled between them within a month after the infant came of age, and without the latter having any assistance, was opened, notwithstanding the vouchers had been delivered up.

THE bill prayed that a warrant of attorney which the plaintiff had given to the defendant to confess judgment for 500*l.* and a memorandum or acknowledgment signed by him, expressing that he was indebted to the defendant in a sum of 1,218*l.* 2*s.* 2*d.* might be delivered up to be cancelled, and for an injunction to restrain the defendant from giving them in evidence in an action at law against the plaintiff, and from proceeding in that action.

In the month of July 1817, the plaintiff, who was then only eighteen years of age, had been for some time married; and although he was likely soon to come into possession of considerable real estates, was then in great pecuniary difficulties. At this time his mother happened accidentally to meet the defendant, with whom she had some previous acquaintance, and entered into conversation with him on the state of her son's affairs. The defendant was an attorney, and on that occasion expressed to the plaintiff's mother a warm desire to be of service to the plaintiff, desiring her to bring him to his chambers in a few days. Accordingly the plaintiff went thither in a few days, accompanied by his mother, and carried with him a copy of the will, under which he was entitled to the property, which was to come into his possession on the death of a lady then of an advanced age.

The plaintiff being at that time in great want of money, it was proposed that the defendant should \*make him an allowance of 320*l.* a year for the maintenance of himself and his family, by quarterly payments. The defendant, however, would not make any advances until he had taken the opinion of counsel as to the validity of any security which he might take for the repayment. A case was accordingly prepared by the defendant

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[1] Where a testator was entitled to a rent charge or annuity, issuing out of an estate of a tenant for life, equivalent to the amount of the annual interest upon the purchase money of the annuity and the annual premiums upon policies effected by him on the life of the tenant for life, to secure the repayment of the principal; and by a subsequent parol agreement the annuity was made determinable by either party; it was held, upon the entire transaction that this annuity and the policies, being merely the securities for a debt, passed under a bequest of all the "*outstanding debts owing*" the testator; and that the word *debentures* in a will was sufficient to include general policies of insurance. *Phillips v. Eastwood, Lloyd & Gould*, 270.

1823.—*Revett v. Harvey.*

and laid before counsel, who advised that, on account of the infancy of the plaintiff, no valid security could be granted.

When the defendant received this opinion, he refused to advance so large a sum as 80*l.* a quarter: but agreed to advance 150*l.* a year, by monthly payments of 10*l.* and 15*l.* alternately. After this agreement, the defendant advanced money to the plaintiff, taking his promissory notes for the amount of each sum advanced. It was expressed on the face of these notes that the cash was advanced by the defendant to pay for the plaintiff's board and lodgings.

In the month of June 1818, the defendant required the plaintiff to give a promissory note for the sum of 500*l.* and a warrant of attorney to enter up judgment against the plaintiff for that sum. It was stated by the bill, that the defendant had only advanced 120*l.* up to that time, and that he required the plaintiff to give this promissory note and warrant of attorney for 500*l.* as a security for future advances, as well as for the advances made up to that time by the defendant; and there was express evidence to that effect. But the defendant by his answer stated that, at the time when the plaintiff gave the promissory note and executed the warrant of attorney, he was actually indebted to the defendant to that amount; but no account of those advances was delivered or stated at that time.

\*The defendant continued to advance sums of money to the plain- [\*504]  
tiff till the month of February 1820, when the plaintiff attained the age of twenty-one. During the whole of this time the defendant acted as the solicitor of the plaintiff, and as his confidential friend and adviser.

On the day on which the plaintiff attained twenty-one, he wrote to the defendant, expressing a wish to be informed how much he was indebted to the defendant for money advanced. The defendant, however, did not supply the information requested by his letter. On the 22d of April 1820, (about two months after the plaintiff had come of age) he called upon the defendant and signed an acknowledgment in the following form, the sum being left blank in the memorandum: "Sir, in adjusting our accounts which have this day been settled at the sum *l.* I cannot withhold the expression of my warmest thanks," &c.

The bill charged, that, at the time when the plaintiff was induced to sign this acknowledgment, the defendant promised, before the sum was filled up, to produce all the vouchers, but that he never did produce them, and never settled any account with the plaintiff; and that the defendant himself afterwards filled up the blank with the sum of 1,218*l.* 2*s.* 2*d.* which was about 800*l.* more than the amount actually due on account of the defendant's advances.

The answer stated that the acknowledgment was voluntarily written by the plaintiff and given by him to a clerk to be copied, and that this copy was signed by the plaintiff on the 22d of April 1820; the sum being left blank; that on the following morning the plaintiff called upon the defendant, when all

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1823.—*Revett v. Harvey.*

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[\*505] the vouchers were \*minutely examined, and the amount of them cast up by the plaintiff, who found the amount, including interest, to be the sum of 1,218*l.* 2*s.* 2*d.* and that the plaintiff, when he had thus ascertained the amount, filled up the blank in the acknowledgment with the sum of 1,218*l.* 2*s.* 2*d.* and that, thereupon, all the vouchers, memorandums and documents relating to the accounts were delivered up to the plaintiff, except the warrant of attorney for 500*l.* which was cancelled and remained in the defendant's possession. The answer likewise stated that no person was present besides the plaintiff and defendant when the vouchers were examined and delivered up, and the amount settled and the blank filled up, as thus alleged.

The answer admitted that no account was ever sent or delivered to the plaintiff, or was ever stated between the plaintiff and defendant, except so far as the settlement on the 23d of April, 1810, could be taken as such account: that the defendant was at first unwilling to advance so large a sum as 80*l.* a quarter to the plaintiff, after he had received the opinion of counsel; but that the distress and entreaties of the plaintiff overcame his unwillingness; and that the defendant had kept no account of his advances to the plaintiff other than such memorandums, notes or acknowledgments as he had delivered up to the plaintiff on the 23d of April, 1820.

The plaintiff, soon after he came of age, employed another solicitor; and, in June, 1820, the defendant commenced an action against him, in the court of exchequer, to recover the sum of 1,218*l.* 2*s.* 2*d.* upon which the present bill was filed.

[\*506] The action at law was defended, but a verdict was recovered for the 1,218*l.* 2*s.* 2*d.* After the verdict, and after the defendant's answer had been put in, a motion was made before the Lord Chancellor to restrain the defendant in this court from proceeding to execution on his verdict at law.

The Lord Chancellor expressed an opinion, upon this motion being made, that the court was not precluded by the verdict at law from granting an injunction in such a case; and his lordship accordingly granted the injunction, upon the terms of the plaintiff paying into court the sum of 405*l.* which was the amount he admitted to have been advanced to him by the defendant.

The cause now came on to be heard.

There was no evidence on the part of the plaintiff as to the figures inserted in the blank in the memorandum. Several witnesses on the part of the defendant deposed that, on comparison, they believed those figures to be the hand-writing of the plaintiff and not of the defendant.

Mr. *Heald*, and Mr. *Collinson* for the plaintiff.

Mr. *Horne* and Mr. *Wakefield* for the defendant, insisted that the most material point in the plaintiff's case, and that on which the principal part of the relief sought by the bill was founded, was the allegation that the blank

1823.—Wynter v. Bold.

which was left in the written acknowledgment had been filled up by the defendant: that that allegation had not at all been proved; that therefore, as the material part of the case had thus fallen \*to the ground, [\*507] the subordinate relief sought by the bill could not be granted; and that a material reason why the court should not now open the account was, that the defendant had, as was stated in his answer, delivered up or destroyed all the vouchers.

The VICE-CHANCELLOR, [after stating the facts of the case]:—It does not appear to me to be necessary to enter into any detailed consideration of the facts of this case. This case must be governed by the principles which apply to a guardian and his ward. The defendant thought fit to place himself in a relation with this infant, which gave him great influence over his mind; and he cannot be permitted to conclude the plaintiff by an acknowledgment signed by him within a month after he came of age, and without the intervention of any friend or adviser on his part.[1]

WYNTER v. BOLD.

1823, 27th November.—*Portions.*

Where a parent, who is tenant for life of a settled estate, with remainder to a trustee for a term of 500 years, upon trust to raise portions for younger children, has power to appoint the portions by deed or will, they cannot be raised in the parent's lifetime; and the whole sum cannot be raised until they have all attained 21.

By the settlement made on the marriage of William Wynter with Elizabeth Bold, certain real estates were conveyed to the use of William Wynter for his life; with remainder to trustees to preserve contingent remainders; with remainder to Elizabeth Bold for her life; with remainder to a trustee for the term of 500 years; with remainder to the first and other sons of the marriage in tail male; with divers remainders over.

\*The trusts of the term of 500 years were, that, in case there should [\*508] be any younger children of the marriage, then the trustee of the term should, by sale or mortgage, raise 3,000*l.* and dispose of the same unto and amongst such younger child or children, in such shares, and at such times, and upon such conditions, and in such manner, as William Wynter and Elizabeth Bold, or the survivor of them, by any deed, will or other instrument in writing, to be by them, him or her executed as therein mentioned, should direct or appoint; and, for want of such direction, should pay the 3,000*l.* to

[1] Vide 1 Story's Eq. 314, 315. Lloyd & Gould, 75, note; a valuable note which is not to be founded in the "Condensed English Chancery Reports." Let the reader observe how the condenser has jumbled together text and notes in the Chancellor's judgment in *Alexander v. Crostie*, Lloyd & Gould, 149. Condensed Reports, Vol. 10.

1823.—Wynter v. Bold.

and amongst such younger child or children, if more than one, share and share alike; and if only one such child, then the whole to such only child at his, her or their respective age or ages of twenty-one years, or day or days of marriage; but in case of the decease of any of them married and leaving issue, the share or shares of him, her or them so dying to go and be paid to and amongst his, her or their children respectively, in equal shares.

In April 1805, William Wynter died, leaving Elizabeth his widow and five children by her surviving. In 1817, the eldest son attained the age of twenty-one, and soon afterwards, in consideration of 1,500*l.* and of a rent charge of 400*l.* secured upon part of the estates, the widow sold and conveyed her life interest to him, and he suffered recoveries of the estates.

In June 1822, the widow, with the concurrence of the eldest son, executed an appointment of the 3,000*l.* among the younger children equally.

The bill in this cause was filed by the eldest son against the widow [\*509] the younger children and the \*trustee; praying that, upon payment of their shares of the 3,000*l.* and interest to two of the children who had attained the age of twenty-one, and, upon payment of the shares of the infants in such manner as the court should direct, it might be declared that the trusts of the term were satisfied, and that the trustee might be directed to surrender it to the plaintiff, or assign it in such manner as the plaintiff might direct.

It was stated in the bill that, in the year 1822, when the widow was desirous of executing the power of appointment, doubts were entertained whether there was power to raise the whole or any part of the portion of any child during the infancy of the child, and whether the portions carried interest during the infancy of the child, or during the life of the widow; and that, in order to obviate these doubts, the plaintiff had concurred in the appointment.

The cause now came on to be heard; and the question was, whether the whole 3,000*l.* or any part of it, could now be raised.

Mr. *Bell* and Mr. *Tempest*, for the plaintiffs;—The first question is, whether the portions can be raised out of a reversionary term; and the next question is whether the whole 3,000*l.* can be raised in one sum.

All the authorities which regulate cases of this description were examined by the Lord Chancellor in *Codrington v. Foley*.<sup>(a)</sup> It is there stated, that if the portion depends upon any contingency the court can- [\*510] not \*direct it to be raised in a case of this kind. But in this case there is no contingency, though there is a power of appointment and that power has been exercised. If the whole sum be raised at once, the court can take care to secure the shares of the infants as effectually as they are now secured by the term.

(a) 6 Ves. 364.

1823.—Rowley v. Eccles.

Mr. *Witham* for the children, and Mr. *Knight*, for the trustee, made no opposition, but left the question to the court.

The VICE-CHANCELLOR :—Whether a portion is or is not to be raised out of a reversionary term, is a question of intention ; and, inasmuch as the mother has power to appoint this sum to the younger children by her will, it is plain that it was not the intention that it should be raised during her life.[1]

The other point is equally against the plaintiff. There is nothing in the expression of this settlement which would justify the raising of the 4,000*l.* as an entire sum, or would deprive the infant children of the security of this term until their portions are paid.

\*ROWLEY v. ECCLES.

[\*511]

1823, 8th and 9th December.—*Practice.*

After a demurrer overruled, the defendant cannot plead to the bill without the leave of the court.

To this bill the defendant had demurred, on the ground that the plaintiff had not stated his place of abode. The demurrer was overruled upon argument. The defendant then pleaded that the defendant did not reside at the place stated in the bill.

Mr. *Wakefield*, for the plaintiff, now moved to take the plea off the file. He said, that the demurrer was in the nature of a demurrer in abatement, not of a demurrer in bar ; that the plea was a plea in abatement ; and that two dilatories could not be filed without the leave of the court. *East India Company v. Campbell* ;(a) *Finch v. Finch* ;(b) *Bancroft v. Wardour* ;(c) *Freeland v. Johnson* ;(d) *Baker v. Mellish*.(e)

Mr. *Cooper*, for the defendant :—I can find only one authority upon the subject, and that is the following passage in Lord Redesdale's Treatise on Pleading : " And if a demurrer should be overruled on argument, because the facts do not sufficiently appear on the face of the bill, defence may be made by plea stating the facts necessary to bring the case truly before the court ; though it has been said, that the court would not permit two dilatories."(f) This dictum of Lord Redesdale is a very strong authority ; for it appears that the objection now made on behalf of the plaintiff was under his lordship's consideration, but that he did not think it of any weight.

\*Mr. *Wakefield*, in reply :—The passage cited from Lord Redesdale's Treatise does not allude to a demurrer in abatement. Neither courts of law nor of equity allow of two dilatories. At law a party cannot plead twice in abatement.

(a) 1 Ves. 246.

(b) 2 Ves. 491.

(c) 2 Bro. C. C. 66.

(d) 2 Anstr. 407.

(e) 11 Ves. 68.

(f) See p. 176.

[1] Vide 4 Kent's Comm. 148, &c. 2 Story's Eq. 268. *Trollope v. Linton*, ante, 485.



1823.—*Roberts v. Smith.*

The VICE-CHANCELLOR :—It is stated that this motion is opposed by the direct authority of Lord Redesdale, in his valuable Treatise on Equity Pleading.

The case of *Hudson v. Hudson*, mentioned by Lord Redesdale, appears, upon reference to the register's book, to be an authority directly in point in support of the present application.(g) The dicta in the other cases which have been cited all tend to the same conclusion. The meaning of the [\*513] expression that two \*dilatories will not be permitted in equity, is that the defendant is only once permitted to delay his answer by plea or demurrer, without leave of the court. After plea overruled, he cannot file another plea or demurrer, without a special order. So, after demurrer overruled, he cannot, without special order, file another demurrer or plea.

Plea ordered to be taken off the file.[1]

### ROBERTS V. SMITH.

1823, 12th December.—*Widow.—Election.*

Testator devised gavel-kind lands to his wife and two other persons in trust, as to one moiety, for his wife during her widowhood, and as to the other moiety, for his children. Held, that the wife must elect between her dower and the provision under the will.

THE question in this cause was, whether the testator's widow was entitled both to her dower and the provision made for her by the will, or was bound to elect between them.

William Roberts, after giving to his wife, Mary Roberts, formerly Mary Harradine, a freehold messuage or tenement and premises in fee simple, and all such ready money as he should have by him at the time of his death, and all and singular his household goods, plate, linen and china, furniture and utensils whatsoever in and belonging to his dwelling-house, for her own use and

(g) "Friday, 29th March.

"Upon consideration this day had by the right honorable the Master of the Rolls, of the humble petition of the plaintiffs, setting forth that they, in Trinity term 1733, filed their bill against the defendants, to which they put in three separate demurrers, which came on to be argued the 16th of this instant March, and were then overruled: That on the 27th of this instant March, the defendants obtained an order that the defendants Benjamin Hudson and his wife, and Catharine Hudson, should be at liberty to take out a commission to take their plea and answer in the country, and that they should have till the first day of the next term to return the same, and that the defendant Joseph Hudson should have till the first seal to put in his plea or answer to the plaintiffs' bill: that the plaintiffs apprehend that it is the practice of the court, where a defendant puts in a demurrer to a bill which is overruled, he shall not be at liberty afterwards to put in a plea thereto. And forasmuch as the said defendants have already demurred to the said bill, which is overruled, it is ordered, that so much of the said order of the 27th of this instant March, as gives the defendants liberty to put in a plea to the said plaintiffs' bill, be discharged; Notice whereof is forthwith to be given to the other side."

Reg. Lib. A. 1733, fol. 242.

[1] Vide *Trim v. Baker*, ante, 469; *Vigers v. Audley*, 2 Mylne & Craig, 49.

1823.—*Roberts v. Smith.*

benefit; and after giving to his son William Roberts, his heir at law, the sum of 1s. gave and devised to Joseph Smith, of the parish of St. Nicholas Deptford, baker, and Joseph Smith, then of the same parish, victualler, but since deceased, and to the said Mary Roberts, certain freehold and leasehold messuages, and all other his estates whatsoever and wheresoever, and all other his property of what nature or \*kind soever, upon trust to pay [\*514] and apply one half part of the money arising therefrom to the said Mary Roberts, during her natural life and so long as she should remain unmarried, for the support and maintenance of herself and the education of Elizabeth Ann Harradine, Joseph Harradine, Mary Harradine, Maria Harradine, and Robert Harradine, the children of her former husband Joseph Harradine, until they should respectively attain their ages of twenty-one years; and then upon trust to pay and apply the same, and also the other half part of the moneys to arise as aforesaid from the time of the said testator's death, in and upon the maintenance and education of all such children as he should happen to leave at the time of his death under the age of twenty-one years, until they should respectively attain their respective ages of twenty-one years; and, immediately on attaining that age, such child to take an equal share of his said freehold property, for the term of his natural life; and, in case of death, he directed that the part or share of him, her or them so dying should go in like manner unto and amongst, and be in trust for the surviving child and children, and to be equally divided between them, share and share alike, until the longest liver should take the whole; namely, unto his sons Henry Roberts, George Roberts, James Roberts, Richard Roberts, and Thomas Roberts, and to his daughters, Mary the wife of James Harris, and Sarah the wife of Thomas Marshall, to hold as joint tenants, and not as tenants in common; and, from and after the decease of all the testator's said children, then to his own right heirs for ever.

The bill was filed by Charles Christopher Roberts, one of the testator's sons, against the surviving executor, \*the widow, the other children of the testator, and the children of the widow by her first husband; and it prayed that the will might be established and the trusts of it performed; that an account might be taken of the rents of the devised estates, and that one eighth part of a moiety of those rents might be paid to the plaintiff.

The testator's freehold estates were of gavel-kind tenure.

Mr. Roupell, for the plaintiff:—The testator, after giving his wife an estate in fee in part of his property, devises all the remainder of his estates to her and two other persons, as trustees. Now that devise is, of itself, sufficient to manifest an intention that the widow should not take for her own benefit what had been devised to her in trust for others. Can it be supposed that the testator would have given her the absolute interest in one estate, if he had thought that she was to take her dower also? She takes under the will more than the custom would give her; for she not only takes the absolute interest in one estate, but also an interest for her widowhood in one moiety of the remainder of the property; and yet she claims not only the whole of this moiety, but

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 1823.—*Grassick v. Drummond.*


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also a moiety of the other moiety. The disposition made by the testator of his property cannot take effect, if this claim is to prevail; and therefore the widow must be put to her election. *Birmingham v. Kirwan*; (a) *Villareal v. Lord Galway*. (b)

Mr. Bell and Mr. Barber for the defendants in the same interest as [\*516] the plaintiff:—\*Your honor's argument in *Lord Dorchester v. The Earl of Effingham*, (c) puts the doctrine upon this subject upon its proper footing. In this case neither the devise in fee to the wife, nor the devise to her and the trustees in trust to sell, will exclude her right to dower. The testator evidently intended an equal division of the trust estates between the widow and the children. But that intention would be defeated if she were to take a moiety for her dower; for then she would take one moiety paramount the will, and half of the other moiety under the will; so that she would take three fourths, and the children one fourth only. This case comes precisely within the principle of *Chalmers v. Storil*. (d)

Mr. Heald for the widow:—In *Chalmers v. Storil*, the will directed an equal division of the property amongst three persons; therefore the testator gave to his widow what she would have taken as her dower. The division in that case seems to me to have excluded the right of dower. If a devise to trustees to pay debts will not exclude the wife's right to dower, how can it be contended that a devise to her and two other persons will have that effect? The devise to the wife and the other trustees is only a devise of all the testator's right and interest, subject to the wife's right of dower, and therefore does not oust her of that right.

The VICE-CHANCELLOR:—The principle referred to in *Chalmers v. Storil*, decides this case. The plain intention of the testator was, that the [\*517] wife should have half the income of his property \*for the maintenance of herself and her children by her former husband, and that the other half of the income should be applied to the maintenance and education of the testator's own children. That intended equality would be disappointed if the wife were, in the first place, to take her dower. [1]

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#### GRASSICK V. DRUMMOND.

1823, 12th December.—*Will.—Construction.*

Testator directed the interest of a sum of money to be paid to his sisters during their lives, in equal proportions, and at their deaths gave to their children the inheritance their mothers derived from his estate, and desired that his sisters should be the residuary legatees, in the proportions already noticed. Held, that the sisters were entitled to the residue absolutely, and that their children took no interest in it.

(a) 2 Scho. & Lef. 444.

(b) Amb. 682.

(c) Coop. 319.

(d) 2 V. & B. 222.

[1] Vide *Adsit v. Adsit*, 2 Johns. Ch. Rep. 448. Amer. Ch. Digest, Husband & Wife, XVII. *Jackson v. Churchill*, 7 Cow. 227. *Fuller and others v. Yates*, 8 Paige, 325.

1823.—*Grassick v. Drummond.*

**CHARLES CHRISTOPHER M'INTOSH**, by his will, dated Canton, 10th November, 1803, after reciting that he considered that he had property to the amount of 30,000*l.* which was positively disposable by him, and that it was his intention to state his desire as to the final distribution of it, appointed James Drummond, Thomas Wilkinson and Charles Forbes, executors of his will, and then proceeded to dispose of his property as follows :—

“I give to the said James Drummond, Thomas Wilkinson and Charles Forbes, or either of them, their executors or assigns, all my personal property, for I boast no inheritance, in trust only for the subjoined purposes. I primarily will that these my named executors cause to be invested in the public funds the sum of 8,000*l.* sterling, the interest whereof I wish in equal portions to be annually paid to my dear mother Penelope, and my sisters, Helen and Margaret, all of Aberdeenshire; and of this principal sum it is my desire that my mother have 1,000*l.* to testify at her death her sense of any kindness experienced during my long and unavoidable absence from her in life, and that my sisters \*then succeed to my annual rent of [\*518] the other 2,000*l.*; and at their respective deaths, I will their children, in equal shares, the inheritance their mothers derived from my estate. Understanding lately that my paternal uncles, James and George, left several children in indigent circumstances, I wish 2,000*l.* sunk on annuity for their common benefit.” The testator then gave several pecuniary legacies, and afterwards expressed himself as follows :—“I desire, in the proportions already noticed, that my mother and sisters be the residuary legatees.”

The testator afterwards made a codicil in the following words :—

“Dirandoo, Ceylon Island, 25th July, 1805.—Imagining on reasonable data, my estate will, by January ensuing, at least realize 50,000*l.*, I desire that the legacy to my paternal cousins may be doubled, and that my mother and sisters, as before stated, continue residuary legatees.”

The testator's sister, Helen, married Peter Grassick; his other sister, Margaret, was widow of George Anderson. Their mother survived the testator, but died before the commencement of the suit.

The bill was filed by the children of the sisters, born in the testator's lifetime, against their parents, the executors of the testator and of his mother, and certain other persons. It stated that the plaintiffs had been advised that they were interested in the whole or some part of the testator's residuary estate; and it prayed that their rights and interests in the residue might be declared and their shares invested and secured for their benefit.

\*The sisters, by their answers, submitted that, under the will and codicils, they and their mother took absolute interests in the residue, [\*519] as tenants in common, and that the plaintiffs had no interest therein.

*Mr. Horne*, and *Mr. R. Roupell*, for the plaintiffs :—The opinion of the court is not asked as to the interests the legatees take in the 9,000*l.* except so far as the disposition of that sum is connected with the disposition of the residue.

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 1823.—*Marshall v. The Corporation of Queenborough.*


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The question to be decided is, what interest the parties take in the residue. The plaintiffs contend that, as the testator's sisters take life-interests only in the 9,000*l.* and after their deaths the whole of that sum (with the exception of the 1,000*l.* which the mother was enabled to dispose of) goes to the plaintiffs; so the sisters take life-interests only in the residue, and after their deaths it also is divisible amongst the plaintiffs. The testator, after disposing of the 9,000*l.* says:—"I desire, in the proportions already noticed, that my mother and sisters be the residuary legatees." These words are to be considered not only as prescribing the shares in which the mother and sisters were to take the residue, but also as designating the proportion of interest which each of them was to take in her share. The testator, in a former part of his will, directs that the children should take the principal of what their mothers took a life-interest in under his will, and therefore it was unnecessary for him to mention the children again in the residuary clause. *Mr. Ball, Mr. Sugden, Mr. Lovat, Mr. Pepys, Mr. Pemberton and Mr. Tennant*, appeared for the different defendants.

[\*520] \*The VICE-CHANCELLOR:—I cannot add to this will upon conjecture.[1] The mother and sisters are to be his residuary legatees in the proportions already noticed; that is, in equal proportions. If he meant that his mother's share of the residue should survive to the sisters and their children, he has unfortunately omitted to express that intention.[2]

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#### MARSHALL V. THE CORPORATION OF QUEENBOROUGH.

1823, 17th December.—*Corporation.*

If a regular corporate resolution has been passed for granting an interest in the corporate property, and, upon the faith of it, expenditure has been incurred, the court will compel the corporation to make a legal grant in pursuance of the resolution, although it is not under the corporate seal. *Semble.*

THE case made by the bill was, that, in 1810, the plaintiff having taken a lease from the defendants of a piece of land adjoining to the channel of a creek, part of the waste land of the borough of Queenborough, on which he had built four houses, and finding that the water of the creek was undermining the foundations, applied to the defendants, at one of their courts, for permission to fill up part of the creek adjoining his houses, and to make a wharf and certain other buildings thereon: that the members of the corporation then present told the plaintiff that they would come and look at the piece of ground which he had applied for; and that, shortly afterwards, the then mayor, and two of the jurors came to view it; when the plaintiff measured out the part which he wanted

[1] Vide *Houstoun v. Hous'oun*, 4 Sim. 611.

[2] Vide *Haig v. Swiney*, ante, 487.

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 1823.—*Marshall v. The Corporation of Queenborough.*


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and pointed out to them the injury which his houses had suffered from the tide : that they were satisfied with the necessity of complying with his request, and verbally granted him the piece of ground : that the plaintiff immediately took \*possession of it, and afterwards made a wharf and certain [\*521] other buildings thereon, at his own expense : that he continued in quiet possession of this piece of ground without paying any rent, or making any acknowledgment to the defendants, or having any demand made upon him in respect thereof, until Easter term 1819, when the defendants brought an action of ejectment against him, and, at the trial of the action, obtained a verdict.

The prayer of the bill was, that the plaintiff might be declared to be entitled to the benefit of the license, which he alleged had been granted to him, for the remainder of the term for which he held the houses ; that the defendants might be decreed to grant him a lease of the piece of ground for the remainder of that term ; and that they might be restrained, by injunction, from entering up judgment, or taking out execution in the action of ejectment.

The answer, and the evidence in support of it, admitted that the application had been made as stated by the bill ; but said that it was rejected, because the project would have injured the navigation of the creek.

Mr. *Sudgen* and Mr. *Warwick* for the plaintiff:—If we can satisfy the court that the case made by the bill and the evidence in support of it is true, the only point in the cause is, whether the corporation is not bound to grant the plaintiff a lease according to the prayer of the bill. Here the corporation, acting by a majority of its members, at a regular meeting, gives a license to the plaintiff to do an act by which he incurs expense. The alterations which the \*plaintiff was making must have been seen by the [\*522] members of the body every day, and yet they allowed the plaintiff to go on expending his money, without attempting to stop him. They acquiesce for ten years in the improvements, and then bring an action of ejectment. At law, we admit, a corporation can be bound only by an instrument under its seal ; but, in equity, it may be bound by a memorandum entered in the corporate books. *Maxwell v. Dulwich College.*(a) In *Macher v. The Foundling Hospital*,(b) the Lord Chancellor seems to think that a corporation may be bound by acquiescence. It seems difficult to conjecture, upon any sound reasoning, why a corporation should not be bound in the same manner as an individual. There is the same injustice in a corporation encouraging a man to build on its estate, and then refusing to fulfil the promise on which the party relied when he erected the building. This corporation has the same power of disposing of its property as any individual. It may either sell or lease all its possessions.

As the houses, at the expiration of the lease, would belong to the corpora-

(a) 1 Treat. Eq. 3d ed. 305, n. (a.)

(b) 1 V. &amp; B. 188.

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 1823.—*Thomas v. Harrop.*


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tion, it was for the interest of both parties that they should be protected from the water; so that we see a consistent motive in the corporation for granting this license. Five witnesses swear that no injury has been done to the creek; and the defendant's witnesses swear so too.

It has been decided, at law, that a parol license, which has been acted upon, is not countermandable, unless the person who granted it pay all the [\*523] expenses incurred by the other party in consequence of it. \**Winter v. Brockwell.*(c) We submit, therefore, that if our case is made out by evidence, this license, followed by the expense which the plaintiff has incurred, will authorize the court to grant us the relief prayed by the bill.

Mr. *Treslove* and Mr. *Pemberton* for the defendants:—A contract, in order to be binding on a corporation, must be under the common seal. *Taylor v. Dulwich Hospital.*(d) And the same rule is laid down by Lord Hardwicke, C. in *Winne v. Bampton.*(e) Here there is no contract under seal. The circumstances of *Maxwell v. Dulwich College* are not stated. All that that case means is, that this court will supply the want of the seal if there is a corporate act which warrants the seal being affixed. Here there is no corporate act at all. There may be the greatest collusion, if the court should be of opinion that a corporation can be bound by loose conversation.

Mr. *Sugden*, in reply, said that, in *Taylor v. Dulwich Hospital*, the parties had been guilty of a breach of trust, and that it was so stated by the Lord Chancellor in the outset of his judgment; and he contended that, at all events, the defendants were bound to stop the plaintiff's expenditure.

The case made by the bill was not proved, and the bill was dismissed. But the Vice-Chancellor (in the course of his judgment,) stated that, if a [\*524] regular corporate resolution passed for granting an interest in a \*part of the corporate property, and, upon the faith of that resolution, expenditure was incurred, he was inclined to think that both principle and authority would be found for compelling the corporation to make a legal grant in pursuance of that resolution.[1]

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#### THOMAS V. HARROP.(a)

1823.—*Award.*

Where an agreement of reference provides that the award shall be made by four persons, or any three of them, and the award purports to be the award of the four, but is executed by three of them only, it is void.

It was provided, in an agreement of reference, that the award should be made by four persons, or any three of them. An award was prepared, pur-

(c) 8 East, 308.

(d) 1 P. W. 655.

(e) 3 Atk. 473.

(a) *Ex relatione.*

[1] *Sed vide, Carter v. Dean and Chapter of Ely*, 7 Sim. 211.

1823.—Willis v. Black.

porting to be award of the four referees, but it was executed by three of them only.

The Vice Chancellor held that it was no good award: that it was not the award of the four referees, because it was signed by three of them only; and that it was not a good award of those three, because it professed to be the award of all the four referees.[1]

## \*WILLIS v. BLACK.

[\*525]

1823, 11th December, and 3d February, 1824.—*Deed.—Construction.*

P. B. on his daughter's marriage, settled a sum of money on her and her husband, and their issue; and, after reciting that he had agreed to make a further provision for his daughter, equal to his other younger children, covenanted to settle, by his will or otherwise, on the husband and wife, and their issue, as great a share of his property as he should by his will or otherwise provide for any of his other younger children, to take effect on the death of the survivor of himself and his wife; and, if he died intestate, or omitted to make such provision, that his executors should pay to the trustees as great a share of his property as his younger children should, in that event, become entitled to. Held, that the trustees had no claim upon the executors for advancements by the settlor to his other younger children in his lifetime, but only for a provision equal to that which the other children became entitled to at his death.

By the settlement on the marriage of Richard Formby with Margaret Black, one of the daughters of Patrick Black, after reciting that, upon the treaty for the marriage, Patrick Black had agreed to give, as a marriage portion for his daughter, the sum of 1,400*l.* payable as therein mentioned, and to make a further provision for his daughter, equal to his younger child or children, as after-mentioned, and that Margaret Black was possessed of 1,400*l.* three per cent consolidated bank annuities, which she had transferred to William Black and Richard Willis; and that, upon the treaty for the marriage, it was also agreed that the 1,400*l.* and such future provision to be made as aforesaid, and also the 1,400*l.* stock, should be settled upon the trusts after expressed; it was witnessed that, in consideration of the marriage and of the provision made by Richard Formby for Margaret Black, it was thereby agreed and declared that after the solemnization of the marriage, William Black and Richard Willis, should stand possessed of the 1,400*l.* stock, and also of the 1,400*l.* to be paid by Patrick Black, and the bonds and securities to be given for the same in manner after mentioned, and also of the further provisions therein covenanted to be made by Patrick Black for Margaret Black; and it was thereby agreed that \*the 1,400*l.*, and also the further provision thereby covenanted to [\*526] be made Patrick Black, and the money to arise from sale of the 1,400*l.*

[1] It is not necessary that all the arbitrators should concur in the decision of every question which arises during the hearing, as to the admissibility of evidence; it is sufficient, if all actually hear the cause, and join in the award which is finally made. *Campbell v. Western*, 3 Paige, 124.



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1823.—Willis v. Black.

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stock to be made as therein mentioned, and all other the estates and effects intended to be thereby settled, as the same should from time to time, after the solemnization of the marriage, be received by William Black and Richard Willis, should be by them paid and advanced and placed out at interest to and with Richard Formby, upon his giving or executing to them his bond in a penalty sufficient for securing such sum and sums of money so from time to time paid and advanced to him; and it was also agreed and declared that William Black and Richard Willis should stand possessed of the 1,400*l.* and all such bonds and securities to be given for the same, and of such future provision as thereby covenanted to be made by Patrick Black in favor of Margaret Black, and of all other estates and effects to which she might at any time become entitled, and the securities and funds whereon or wherein the same should be placed out and invested, and also, after the solemnization of the marriage, of the 1,400*l.* stock, in trust for Richard Formby for his life; and, after the decease, in trust for Margaret Black for her life; and, after the decease of the survivor of them, upon certain other trusts therein mentioned. Then followed a covenant in the following words:—

“And, for the considerations aforesaid, the said Patrick Black doth hereby, for himself, his heirs, executors, administrators and assigns, covenant, promise and agree to and with the said William Black and Richard Willis, their executors and administrators, in manner following, that is to say, that he the [\*527] said Patrick Black, by his last will and testament, \*or otherwise, shall and will give, devise, bequeath, or otherwise settle and secure, to or in favor of the said Richard Formby and the said Margaret his intended wife, and to and for the issue of the said intended marriage, upon the trusts nevertheless aforesaid, as full and great a part and share of his estates, effects and property as he shall by his said will, or otherwise, give and provide to or for the use of any of his other younger child or children, to take effect on the death of the survivor of himself and his present wife; and also that, in case he, the said Patrick Black, shall happen to die intestate, or omit to make such provision or bequest to the use or in favor of the said Richard Formby and the said Margaret his intended wife, and to and for the issue of the said intended marriage, the heirs, executors or administrators of the said Patrick Black shall and will pay, or cause to be paid, to the said William Black and Richard Willis, or the survivor of them, his executors or administrators, as full and great a part and share of the estates, effects and property of the said Patrick Black, as or to which his younger child or children shall, in that event, become entitled, upon the trusts nevertheless, and for the intents and purposes hereinbefore declared and expressed, concerning the said sums of money, estates and effects hereinbefore settled as aforesaid, or such of them as shall be then existing and capable of taking effect.”(a)

(a) This settlement contains some inaccuracies, but it is correctly copied from the briefs.

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1823.—Willis v. Black.

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There was no issue of the marriage.

Mrs. Formby died in her father's lifetime. By her will, and a codicil thereto, made in pursuance of the \*power reserved to her by the [\*528] settlement, she appointed Richard Formby and Miles Formby, and the defendant Edith Black, her executors; and she gave and appointed to them all the trust property to which she was entitled, or which she could dispose of, upon the trusts mentioned in her will.

Patrick Black by his will, dated the 14th of September 1809, gave unto Edith Black and George Monk, their heirs, executors, administrators and assigns, all his real and personal estates and property whatsoever and where-soever, upon trust to make sale of such parts of the same as were saleable and to collect and get in the other parts, and, with the moneys to arise therefrom, to pay 500*l.* to the trustees of the settlement, to be applied by them to the trusts thereof; 500*l.* to William Black, his executors, administrators and assigns; and 500*l.* to Edith Black, her executors, administrators and assigns; and he declared that he did so for the purpose of making an equal distribution of his estate and effects amongst his children, he having already advanced to John Black the sum of 500*l.* more than any of his other children; and the remainder of the money to arise as aforesaid he directed his trustees to divide into four equal parts, and to pay one-fourth part to the trustees of the settlement, and the three other fourth parts to William Black, Edith Black, and John Black.

Patrick Black died on the fifth of November 1816, having had four children, namely, Andrew Black, his eldest son, who died in his lifetime, and the two other sons and the daughter named in his will, who all survived him.

\*After the execution of the settlement the testator transferred 100*l.* [\*529] long annuities, and gave some sums of money to each of his three surviving children, without making any addition to the provision he had made for Mrs. Formby by the marriage settlement.

The bill was filed by Richard Willis, and Richard and Miles Formby against Monk, and the testator's surviving children; and it prayed that the covenants contained in the settlement might be specifically performed, that an account might be taken of all sums of money advanced and paid by the testator to, for, or on account of other stock transferred into the names of his surviving children; that the whole of his property might be so divided as that Mrs. Formby's share might be settled upon the trusts of the settlement; that an account might also be taken of all sums of money which had been advanced by the testator to his surviving children; and that the plaintiff might be paid such sum of money as would be equal in amount to such share of interest as Richard Formby should be found entitled to, to make him equal to the surviving children.

The cause was first heard by the Vice-Chancellor on the 13th of May 1820. The decree declared that the testator was bound by the covenants in the set-

1823.—Willis v. Black.

tlement to make provision for Mrs. Formby, her husband and the issue of the marriage, including the 1,400*l*, advanced at the time of the marriage, equal to the share of any younger child, either in his real or personal estate, by provision or gift in his lifetime, or by his will, to take effect upon his death. And it was referred to the master to inquire what provision or gifts were made by the testator in his life, or by his will, in favor of his younger children out of his real and personal estate.

[\*530] \*Monk, and John and Edith Black, being dissatisfied with the decree because the inquiry directed by it was carried back to a period anterior to the settlement, petitioned to have the cause reheard.

At the re-hearing, Mr. *Heald* and Mr. *Roupell* were counsel for the plaintiffs, and Mr. *Horne* and Mr. *Koe* for the defendants.

In the course of the argument, the Vice-Chancellor said, that it had hitherto been considered both by himself, and at the bar, that there was an intention on the part of Patrick Black to make all his younger children equal, and that the only question was, in what manner that intention was to be carried into effect; but that, having carefully perused the settlement, he felt considerable doubts whether that was the intention of the covenantor: or, if it was, whether it could be executed without acting in direct violence of the words of the covenant. His honor desired that it might be now considered at the bar, whether, as the expression, "to take effect on the death of the survivor of himself and his present wife," was used in the former clause of the covenant, the words "in that event," which occurred in the latter clause, must not be construed as limiting the amount of the additional fortune which Mrs. Formby was to take, to the amount of the provision which the covenantor's younger children should become entitled to at his death. His honor added, that as this was quite a new view of the case, he would allow the cause to be re-argued at any time that the counsel might agree upon.

[\*531] \*The cause was accordingly re-argued on this day by Mr. *Heald* and Mr. *Preston*, for the plaintiffs.

It appears, by the recitals of this settlement, that it was the object of Mr. Black, when he entered into this covenant, to secure to Mr. and Mrs. Formby an equal participation in his property with his other younger children. The words, "to take effect on the death of the survivor of himself and his present wife," do not refer to the provision which the settlor might make for any of his other younger children, but to that which he was to make for Mr. and Mrs. Formby. It is highly improbable that the settlor meant that Mr. and Mrs. Formby should have any addition made to their portion in case he reserved to himself and his wife a life interest in what he should give to his other younger children, but that they should take nothing in case he gave it out and out; for it could make no difference to them whether the settlor did or did not reserve a life interest for himself and his wife in the provision made for his other younger children. If that construction were adopted, it would enable Mr.

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Black to commit a fraud upon the settlement, by omitting to reserve to himself and his wife a life interest in the fortunes he might give to his other younger children.

The clause which enables the father to reserve a life interest to himself and his wife, opposes the construction that Mrs. Formby's fortune was to be increased with reference only to the provisions which the other younger children should take at the death of the father under his will or intestacy; for a man cannot reserve a life interest to himself to continue after his death; and the words, "or otherwise," refer to acts *inter vivos*. The most reasonable interpretation \*that can be put upon the covenant is, that the [\*532] further provision for Mr. and Mrs. Formby was to take effect on the death of the survivor of Mr. and Mrs. Black. The first clause of the covenant contains a substantive, independent covenant, which is not qualified or restrained, but enforced by the subsequent clause: and, in an action brought upon it by the covenantees, it would not be necessary to state the second branch in the declaration. *Howell v. Richards.*(a) The reference to the death of the father proves that it was intended that a portion given to any of the other younger children, should create a right in Mrs. Formby to an equal portion. It was never meant that the only provision for the younger children, which was to give Mrs. Formby a right to an increase of her fortune, was one which was to take effect at the death of the settlor; but that that was the period at which the whole amount of the provisions for younger children was to be ascertained.

The only difficulty, in the second clause, arises upon the words, "in that event." Your honor understands those words to relate only to the death of the settlor. We contend that they mean, "in the event of my death intestate, or having omitted to make the provision for you which I have bound myself to do by the prior clause of the covenant." There is no single or particular event mentioned in the covenant, to which those words can be referred; and, therefore, they must be construed "under those circumstances;" that is, the portion of Mrs. Formby shall, at the death of her father, be equal to the portion which the other younger children shall have received up to that time, \*whether derived under deed, will or intestacy. Why did the [\*533] settlor refer to the omission to make provisions, if he had not intended, that portions given in his lifetime should be taken into account? By this construction, all the parts of the covenant are consistent with each other and with the recitals of the deed. If the other construction were adopted, what absurdities would follow; for, suppose he had given in his will all his property except 50*l.* amongst his other younger children, then Mr. Formby would not have claimed more than a share of this 50*l.* and the settlor would be enabled to commit a fraud upon the covenant.

(a) 11 East. 633.

1823.—Coope v. Banning.

The Vice-Chancellor, without hearing the counsel for defendants, delivered judgment as follows:—The question upon this covenant is, whether it was the intention of the testator to bind himself to give to Mr. and Mrs. Formby as large a share of his property as he should at any time devise or give to any other of his younger children, or only as large a share of his property as any other of his younger children should, by his gift or devise, become entitled to at his death, or at the death of the survivor of himself and his wife. The expressions in the first clause of the covenant may be considered as ambiguous; but it is clear, in the second clause, that Mr. and Mrs. Formby were only to take such part or share as any other of his younger children should become entitled to in the event of his death; and he had, therefore, full power during his life to make a present disposition of any part of his property to any of his younger children. The language of his will shows that this was his own conception of the covenant.[1]

[\*531]

\*COOPE v. BANNING.

1823, 12th December.—*Will*.—*Construction*.

Testator, after giving some legacies, directs payments to be made to his devisees, as under; and then mentions certain persons, and the sums to be paid to them, and gives the residue to all his devisees above mentioned, in proportion to their legacies. Every one of the legatees is entitled to a share.

JOSHUA ROSE made his will as follows:—"I give and devise unto Thomas Banning of Liverpool, postmaster, and Charles Clements of Liverpool, attorney at law, all my real and personal estates, of what kind soever, in trust to sell or exchange any part thereof, and as speedy as can with propriety be done, for the most money that can be obtained; and first, to discharge all my just debts and funeral expenses out of the produce arising from the sale of my property; and, after that is done, it is my will that my trustees above named do pay unto Jane Thomas, otherwise Jane Anderson, 1,000*l*. and to her daughter Eliza and son Joshua, 50*l*. each, annually, until they arrive to the age of 21 years, at which period they, or the survivor of them, shall receive the principal sum of 2,000*l*.; and I also direct my said trustees to pay unto my devisees as under, as soon they can:

"To the son of Thomas Banning, named Joshua, or his guardians, 1,000*l*.; and to Captain Grantham Hodgson, 1,000*l*.; and to my nephew William Denck, 1,000*l*.; and to my niece, Ellen Lunt, wife of Thomas Lunt, 1,000*l*.;

[1] Family settlements are to be construed most favorably to promote and effectuate the intentions of the party settling. *West v. Briscoe*, 6 Har. & Johns. 460. See also, *Leird v. Tobin*, 1 Molloy, 543.

1823.—*Coope v. Banning.*

and to Hannah Potter, 1,000*l.*; and to her brother John Potter and her sister Elizabeth Potter, 500*l.* each; and to Ellen Lunt, daughter of Ellen Lunt, 500*l.*; and the rest, residue and remainder I give unto all my devisees above named, share alike, in proportion to their several legacies, first deducting from the principal, 200*l.* to be taken to the use of my executors, each a moiety, namely, Thomas Banning and Charles Clements, to be my true and lawful, executors of this my last will."

\*The bill was filed by Jane Anderson, and her son and daughter [\*535] (who were infants) against the executors and the other persons beneficially interested under the will; and it prayed that the plaintiffs might be declared to be entitled to distributive shares of the testator's residuary estate, in proportion to their several legacies, equally with the other legatees named in the will.

Mr. *Bell* and Mr. *Koe*, for the plaintiffs, said, that by the word "devisees" the testator meant "legatees;" and that, as he had given the residue of his property to all his devisees above named, none of the legatees named in the will could be excluded from a share, and that therefore the plaintiffs, as well as the other legatees were entitled to a share of the residue.

Mr. *Hart*, Mr. *Agar*, Mr. *Sugden*, Mr. *Roupell*, Mr. *Blenman* and Mr. *Cooper*, for the defendants:—The plaintiffs are not devisees within the intention of the testator. Mrs. Anderson's children were to have nothing but annual payments unless they attained the age of 21 years. Their legacies were contingent until that event. The testator contemplated an immediate distribution of his property; and with that view directs Joshua Banning's legacy to be paid to his guardians. But there was no person to whom the legacies given to Mrs. Anderson's children could be paid.

The testator, after directing payments to be made to his devisees as under, proceeds to mention certain persons, and he then uses the expression "my devisees above-named." He never calls the plaintiffs devisees. The only persons whom he so calls are the \*other legatees; and there- [\*536] fore by the expression "my devisees above named," he must have meant the persons whom he had called devisees.

From the manner in which the will is divided into paragraphs, it clearly appears that the testator meant to comprise, under the description of his devisees above-named, those persons only whom he had before mentioned as his devisees as under.(a)

The VICE-CHANCELLOR:—The testator gives his residuary estate to all his devisees above named, share and share alike, in proportion to their several legacies. By the term devisees he plainly means legatees. It is argued that, from the manner of writing and pointing the will, not all the legatees above

(a) The words "as under" seem to be referred to the words "to pay;" and the meaning of the expression to be, "I direct my trustees to pay to my devisees such sums of money as are under mentioned."

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 1823.—*Dawson v. Sadler.*


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named, but some of those legatees only, are to take the residue. I think the inference derived from the form of the will much too slight to be opposed to clear and unequivocal expressions.[1]

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[\*537]

\*DAWSON v. SADLER.

1823, 18th and 19th December; 1824, 20th April.—*Award.—Jurisdiction.—Pleading.*

Injunction to stay proceedings on an award, on the ground of fraud and corruption in the arbitrator, refused, where the submission was, within due time, made a rule of the court of king's bench, although the bill was filed before the submission was made a rule of that court, and although it might, according to the agreement, have been made either a rule of this court, or of the court of K. B.

To a bill to set aside an award charging fraud and corruption in the arbitrator, the defendant answered as to the fraud and corruption, and demurred to the rest of the bill. Held, that the answer overruled the demurrer.

THE bill prayed that an award might be set aside, and the defendants restrained from proceeding to recover the sum awarded against the plaintiff.

The plaintiff and defendants had agreed by deed to refer an action in replevin and all matters in dispute between them to the arbitration of a certain person; and that the award and the submission should, at the instance of either party, be made an order of the court of chancery, or a rule of the court of king's bench. On the 1st November 1823, the arbitrator made his award, by which he directed a considerable sum to be paid by the plaintiff to the defendant John Sadler.

On the 26th of November 1823, the plaintiff filed his bill in this cause against John Sadler, the sureties in replevin, and the arbitrator, alleging fraud and many other objections to the award. Neither the submission nor the award had been made a rule of either court, at the time when the bill was filed. The bill charged that the defendant, John Sadler, threatened to procure the award to be forthwith made a rule of this court, or the court of king's bench, and to commence proceedings at law against the plaintiff to recover the sum awarded to be paid by him.

On the day on which the bill was filed, the plaintiff gave notice of a motion for an injunction according to the prayer of the bill. On the 28th of November 1823, before the motion could be made, the defendant John

[\*538] \*Sadler made the submission a rule of the court of king's bench.

The motion for an injunction was now made; and it was objected, for the defendants, that this court had no jurisdiction.

Mr. *Heald* and Mr. *Girdlestone*, junior, for the plaintiff:—This court has jurisdiction to relieve against this award:

[1] Vide *Adie v. Cornwell*, 3 Monroe, (Kentucky) 279. *Breckenridge v. Duncan*, 2 A. K. Marsh. (Kentucky.) 51. *Covenhoven and others v. Shuler and others*, 2 Paige, 130. *Rathbone v. Dyckman*, 3 Paige, 26, 29.

1823.—Dawson v. Sadler.

1st. Because the submission was not made a rule of the court of king's bench before the bill was filed. Where, as in this case, the agreement is that the submission may be made a rule either of this court or of a court of common law, and a bill is filed in this court, impeaching the award, before the submission is made a rule of the court of common law, the party insisting on the award cannot, by subsequently making it a rule of the court of law, oust this court of its jurisdiction. That question occurred in — *v. Mills*,<sup>(a)</sup> but was not there decided. In *Gwinett v. Bannister*,<sup>(b)</sup> it was held, the jurisdiction to set aside an award is confined to the court in which the submission is made a rule. But the present case is distinguished from *Gwinett v. Bannister*, by the fact that the bill was filed in this court before the award was made a rule of the court of king's bench.

2dly, Because the agreement in this case was, that the submission should be made a rule either of the court of king's bench or of the court of chancery, \*at the option of either party; and the plaintiff, by filing this [\*539] bill, did that which was equivalent to making the submission a rule of this court. The plaintiff has, therefore, exercised the option, which was given to him by the agreement, of giving this court, and not the court of king's bench, the jurisdiction as to this award.

3dly, Because the complaint in this case being of fraud and corruption in the arbitrator, it is an excepted case under the latter words of the 1st section of the stat. 9 and 10 W. III. c. 15.<sup>(c)</sup> This court had jurisdiction before the statute to set aside an award to which there was an objection of that kind. There is nothing in the act which makes it imperative on a party in such a case to take proceedings in the court of law in which the submission has been made a rule, instead of having recourse to the original jurisdiction of this court. *Ward v. Periam*.<sup>(d)</sup> The object of the legislature was not to divest this court of its jurisdiction, but to give the party who wished to avail himself of a just award the summary remedy of process of contempt to compel the performance of it.

Mr. Wakefield, for the defendants.

\*The VICE-CHANCELLOR:—The authorities referred to have, in effect, [\*540] determined the questions which are here raised. No court has jurisdiction to set aside an award under the statute, except the court in which the submission is made a rule; and there the application must be made before the last day of the next term after the award. It is said, that the filing of this

(a) 17 Ves. 419.

(b) 14 Ves. 530.

(c) The statute directs, that the court, of which the submission has been made a rule, shall issue process against the party neglecting or refusing to perform the award; and then proceeds in these words; "Which process shall not be stopped or delayed in its execution by any order, rule, command or process of any other court, either of law or equity, unless it shall be made appear on oath to such court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration or umpirage was procured by corruption or other undue means.

(d) 2 Eq. Ca. Ab. 91, and more fully stated in a note to *Auriol v. Smith*, 1 Turner's Rep. 131.



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bill is equivalent to making the submission a rule of this court, and that the bill was filed before the last day of the next term after the award. I am of opinion that the filing of this bill is not equivalent to making the submission a rule of this court; first, because it is not within the language of the statute; and next, because it is not within the principle of the statute; the object of which plainly was, to create a summary jurisdiction for the decision of awards.

It appears that, in this case, the submission was made a rule of the court of king's bench on the 28th November. I think that, however, not material as to the question of jurisdiction upon this bill. In the late case of *Davis v. Getty*, (e) I had occasion to state my opinion, that this court could not acquire jurisdiction from the circumstance that the submission was not actually made a rule of any court; because either party has a right to take this step, and cannot transfer the jurisdiction by neglecting to do an act within his own power.

It has been argued that, inasmuch as this bill insists that the award was made in consequence of fraud and corruption in the arbitrator, by the [\*541] effect of the concluding words of the first section of the act this \*court has a general jurisdiction as upon an excepted case. I apprehend that this argument proceeds upon a clear misconception of the statute. The second section gives to the court where the submission is made a rule an authority to set aside an award made by corruption or undue means. These words plainly comprise the fraud and corruption of the arbitrator, and were doubtless intended to reach every case where the award ought to be set aside. The first section enables the party in whose favor the award is made to enforce obedience to it by process of contempt from the court where the submission is made a rule, unless it shall appear upon oath that the arbitrators misbehaved themselves, or that the award was procured by corruption or other undue means. The very same words, therefore, are used here as are used in the second section, and plainly mean to comprise the fraud and corruption of the arbitrator, and every other case where the award ought to be set aside; because it could not be the intention of the legislature that any such award should be enforced. The whole act taken together means this, that the party in whose favor the award is made may enforce it by the process of the court where the submission is made a rule, unless it shall appear to that court that it ought to be set aside as unduly made, and in such case the same court shall not merely refuse the aid of its process, but, if complaint be made within the time limited, shall actually proceed to set it aside.

Motion refused.[1]

[\*542] \*After this motion each of the defendants demurred to the whole bill, except the charges of fraud and corruption, which they answered.

(e) Ante, 441.

[1] Vide ante 414, and note, *ibid.*

1824.—*Rist v. Hobson.*

**THE VICE-CHANCELLOR** :—These demurrers bring before me, in a grave form, the same questions as occurred in this cause upon the motion for an injunction. I was then, and am now of opinion that, where by the agreement of reference the submission is to be made a rule of any court, there the only course of proceeding to impeach the award is to make the submission a rule of that court, and to apply summarily for its aid. It makes no difference that there are charges of fraud and corruption in the arbitrator. If the agreement of reference be that the submission shall be made a rule or order of this court, this court does not thereby acquire a jurisdiction over the award by bill, but the parties must proceed summarily under the statute.

It is a necessary consequence of these principles, that the demurrers ought to have extended to the whole bill, and that the answers as to the charges of fraud and corruption overrule the demurrers.[1]

The Vice-Chancellor said he was disposed to give the defendants leave to amend their demurrers and answers, by making them general demurrers to the whole bill. But a compromise took place, and no further proceedings were had in the cause.

\**RIST v. HOBSON.*

[\*543]

1824, 16th January.—*Pleading.*

If a bill for specific performance of an agreement state that the agreement was in writing, signature will be presumed.

THE bill was filed by the vendor against the purchaser of an estate, to compel a specific performance of the agreement for the purchase. It stated that the agreement was reduced into writing, but did not allege that it was signed by either of the parties; and for that reason the defendant put in a general demurrer.

Mr. *Blackburne*, in support of the demurrer, referred to the fourth section of the statute of frauds, and said that, before an action could be brought, or a bill filed upon any agreement, the statute distinctly required that there must be not only some memorandum or note of it in writing, but that such memorandum or note, must be signed by the party against whom the action is brought or the bill is filed.

Mr. *Heald* and Mr. *Merivale*, in support of the bill, said, that it was not necessary that the bill should allege that the agreement had been signed, or even that it had been reduced into writing; and that, at law, it was sufficient if the declaration stated an agreement generally, without averring that it was in writing.(a)

(a) 6 Ves. 555.

[1] Vide *Story's Eq. Plead.* 365, 366, where the above decision is criticized.

1824.—*Aspinall v. Petvin.*

The Vice-Chancellor said, that the bill contained an allegation that there was an agreement in writing: that, if the paper was not signed, it was [454] not an agreement; and that, therefore, signature must be presumed until the contrary was shown.

Demurrer overruled. (b)

### ASPINALL V. PETVIN.

1824, 28th January.—*Devise.*—*Implication.*

Devise of lands to trustees, upon trust to pay one moiety of the rents to devisee's wife for her life, and the other to his only son; and after the wife's death to convey to the son in fee; but if the son died without issue in the wife's life, to convey to devisee's nephew in fee. The son died without issue in the wife's life. She is not entitled for life, by implication, to the moiety devised to the son.

THE bill prayed that it might be declared that, according to the true construction of Humphrey Aspinall's will, the plaintiff John Aspinall became entitled, on the death of William Heron Aspinall, to one moiety of the rents of the hereditaments devised by the testator, during the life of the testator's widow.

The widow put in a general demurrer for want of equity to part of this bill.

On the argument of the demurrer, the questions were, whether, on W. H. Aspinall's death, the widow became entitled to an estate for life, by implication, in the moiety of the testator's real estates, which was not expressly devised to her, or whether, on that event, the plaintiff became entitled to it.

The will was as follows:—"I give and devise to my good friends Thomas Skinner and Richard Knight all and every my freehold and copyhold [455] messuages, lands, tenements and hereditaments whatsoever, to hold to them the said Thomas Skinner and Richard Knight, and their heirs, upon trust to receive and take the rents, issues and profits thereof, and to pay and apply one moiety or half part thereof to my dear wife Elizabeth Aspinall, during her natural life for her own use, and to pay and apply the other moiety or half part thereof for the use and benefit of my son William Heron Aspinall, during his minority, in such manner and proportion as they in their discretion shall think proper; and, from and after he shall have attained his age of twenty-one years, to pay the said moiety of such rents and profits to him for his own use; and, from and immediately after the death of my wife Elizabeth Aspinall, upon trust to convey and surrender all my said freehold and copyhold messuages, lands, tenements and hereditaments unto my son William Heron As-

(b) In the course of the argument in this case, the propriety of a defendant availing himself of the statute of frauds by way of demurrer was discussed, and the cases of *Whitechurch v. Bevis*, 2 Bro. C. C. 559, and *Redding v. Wilkes*, 3 Bro. C. C. 400, were referred to. [It is unnecessary to allege, in a bill, that a contract within the statute of frauds was in writing but the defendant must take advantage of the objection by plea or answer; if however the bill shows that the contract was not in writing, without stating sufficient grounds to take the case out of the statute, a demurrer will lie. *Coxine v. Graham*, 2 Paige, 177.]

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 1894—*Aspinall v. Petvin.*


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pinall, his heirs and assigns for ever; but if my said son shall depart this life without issue in the lifetime of my said wife, then upon trust, after the death of my said wife, to convey and surrender the same unto my nephew John Aspinall, of Newborough, near Ormskirk, in the county of Lancaster, his heirs and assigns for ever. And it is my will and meaning that, in case my said wife Elizabeth Aspinall shall depart this life before my said son shall attain the age of twenty-one years, that my said trustees and their heirs shall continue to receive the rents and profits of my said freehold and copyhold estates, and apply the whole thereof, or so much thereof as they shall deem necessary, for the use and benefit of my said son, till he has attained that age. And I do hereby authorize and empower my said trustees and their heirs to let, set and manage my said freehold and copyhold estates, during the continuance of the trust hereby in them reposed, in such \*manner as they shall judge [\*546] most for the benefit of the persons interested therein."

In 1792 the testator died, leaving W. H. Aspinall, his only child, his heir at law. In 1796 W. H. Aspinall attained the age of twenty-one years; and, in, October 1804, died intestate and without issue, leaving the plaintiff (who was the testator's nephew mentioned in his will) his heir at law, and who thereupon became the heir at law of the testator.

The bill alleged that, upon the death of W. H. Aspinall, the plaintiff became entitled to one moiety of the testator's real estates, or to receive one moiety of the rents thereof, during the lifetime of the widow, and to the whole of those estates after her decease.

*Mr. Sudgen* and *Mr. Palmer* in support of the demurrer:—The testator gives, expressly, one moiety of his freehold and copyhold estates to his wife for her life, and the other to his son, generally, without any words of restriction. After the death of the wife, the son is to have a conveyance in fee made to him of the whole estate. But if he died without issue in the lifetime of the wife, the trustees are directed to convey the estate to the plaintiff. But he is not to take any thing until after the death of the wife. There is no devise of the moiety given to the son. The question is, whether under these circumstances there is not a necessary implication in law that the widow is to take that moiety, as well as the one which is expressly devised to her?

One point is quite clear upon the authorities, that, if a testator devise to his heir after the death of his wife, \*the wife takes for life by [\*547] implication; because the devise to the heir shows an intention that he is not to take until after the death of the wife. The rule is the same where the devise is to a stranger after the death of the wife. Considering the rule to be as we have stated it, it is clear that the widow is entitled to the moiety given to W. H. Aspinall; for it is devised to the person who must be the heir at law of the testator, as well as of his son, at the time when the devise is to take effect. The question is not who is the heir of the testator at his death, but who is his heir at the time when the devise takes effect. There

1823.—*Aspinall v. Petvin.*

is no devise to the nephew, except in the event in which he must be the heir of the testator, namely, the death of the son without issue, and therefore the principle of the rule applies in this case. In the case of *Doe v. Bowling*(a) it was admitted in the argument, in reply to a question put by Abbott, C. J., that on the death of the three daughters without issue, the heir at law of the survivor would be one of their three uncles mentioned in the residuary clause and it was held that the husband did take an estate for life by implication. There is a case in the Year Book, 13 H. 7. fol. 17, in which a man devised his goods to his wife, and that, after the decease of his wife, his son and heir should have the house where his goods were; and it was held that this was a good devise of the house to the wife for her life by implication. This is a very strong case, because the goods were expressly given to the wife for life, and the house was not expressly given to her. This case is referred to in Bro. Ab. Title Devise, pl. 52. There is another case, pl. 48, which is as follows: "A man wills that J. S. shall have his land after the death of [\*548] of his wife, and dies; there the wife \*of the devisor, by these words, shall have the land for term of her life, *ratione intentionis voluntatis*." Lord Chief Justice Vaughan, in giving judgment in *Gardner v. Sheldon*,(b) states the former of these two cases as an authority. But he endeavors to overrule the latter of them, by drawing a distinction between a devise to a stranger, and to the heir. The case of *Horton v. Horton*(c) is said not to have been determined, and is clearly overruled by *Roe v. Summerset*.(d) In late cases implications have been made which would not have been made in former ones: as in *Tenny v. Agar* (e) and *Romilly v. James*. (f) In the case in Bro. Ab. pl. 49, the law was held the same in the case of a stranger as in the case of an heir. Under the authority of this case and of *Roe v. Summerset*, we contend that the widow is entitled to an estate for life, by implication, in the son's moiety. The other point in this case is, whether the widow, having had one moiety of the rents given to her expressly, is not precluded from taking any thing more by implication. The case in 13 Hen. 7, is an express authority for answering this question in the negative. For there the express gift of the goods did not prevent the widow from taking the house by implication. And the same doctrine is laid down by Vaughan, C. J. (g) Besides these moieties are as distinct as any estates in severalty; and the nephew is to take nothing but the entirety.

Mr. *Agar* and Mr. *Spence*, for the plaintiff:—The question which has been argued for the defendant does not arise; for this is a mere trust [\*549] estate. \*The rents of one moiety are to remain in the hands of trustees until the death of the wife, for the benefit of the heir. An estate by implication is given only where there is no tenant to the freehold. Here

(a) 5 B. & A. 722. (b) Vaughan, 263. (c) Cro. Jac. 74. (d) 5 Burr. 2608; and S. C. 2 Black. 692.

(e) 12 East, 253.

(f) 1 Marshall, 592.

(g) Vaughan, 265, 266.

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there is no necessity for giving such an estate ; because the trustees are tenants of the freehold. To exclude the heir there must be a necessary implication that he is not to take. Is it necessary implication that, because the nephew is to have the legal estate conveyed to him after the death of the widow he is not to enjoy one moiety of the rents during her life ? The law upon this subject is very clearly laid down by Vaughan, C. J. (h) That the same doctrine is still law, appears from the case of *Dyer v. Dyer*.(i)

Mr. *Sugden*, in reply, said, that it made no difference in this case that there was a devise to trustees, for that the court would put the same construction upon the devise in question as it would upon a direct devise to the parties.

The VICE-CHANCELLOR :—If this case involved the general points which have been urged on the part of the defendant, it would undoubtedly have been my duty to send it for the opinion of a court of law. But these points do not arise ; and there is, in this case, nothing which I can send to a court of law.

The testator devises his estate to trustees, upon trust, after the death of his widow, to convey it to his son, and, if his son happen to die without issue living the widow, then, after the death of his widow, to convey \*the estate to his nephew ; and, as to the interim rents and profits, [\*550] upon trust to pay a moiety to the widow for her life, and the other moiety for her life to the son. He happens to make no further disposition of this moiety of the rents and profits, if the son should chance to die before the widow ; and the question is, whether the court is therefore to intend that he meant the widow to take that moiety also. There is neither authority nor principle for such an implication. It has been argued that it is now to be considered as the rule of construction, that, if an estate be given not to the heir, but to a stranger, after the death of A., A. takes by implication. I cannot allow such a proposition to pass without entering my protest against it. I am not aware there is any authority to support it. If a testator gives to his heir, after the death of A., he plainly means that his heir should not take during the life A., and, having named no other person to take during the life of A., it is necessarily to be implied that he means A. to take during his own life. But if the testator gives to a stranger after the death of A., it does not plainly and necessarily appear from thence that he means that his heir should not take during the life of A. ; and it is against the first principles of construction to disinherit an heir by conjecture.[1]

(A) See *Vaughan*, 262.

(i) 1 Mer. 414.

[1] In a case of doubtful construction, the interest of the heir is in the first instance to be regarded ; *Walker v. Parker and others*, 13 Peters, 173.

1824.—Whyte v. O'Brien.

[\*551]

\*WHYTE v. O'BRIEN.

1824, 27th January.—*Set-off*.—*Injunction*.

A person against whom a verdict had been obtained, having afterwards acquired a demand to a greater amount against the party who obtained it, is not entitled to an injunction to restrain proceedings on the verdict.

THE court was moved, on behalf of the plaintiff, for an injunction to restrain the defendant from proceeding to execution upon a verdict obtained by him in an action at law against the plaintiff.

The bill stated that, since the verdict had been given against the plaintiff, he had acquired by purchase bills of exchange accepted by the defendant to an amount exceeding that for which the verdict had been obtained. There was an affidavit of this fact.

Mr. *Sugden* and Mr. *Wilson* for the plaintiffs.

Mr. *Simpkinson* for the defendant.

THE VICE-CHANCELLOR :—The question is, whether a bill of this kind can be maintained. At law, where a defendant claims a set-off, the truth of his claim comes to be tried at the same time with the demand raised by the action, and is decided by the same verdict. If after the verdict the defendant acquires for the first time a cross demand against the plaintiff, he cannot, for that reason, by any proceeding at law defeat or delay the plaintiff from the benefit of his verdict. It is not reasonable that a cross demand thus subsequently acquired should delay the plaintiff from the benefit of his verdict, until the validity of this demand is ascertained by a second trial; and in this case, equity must follow the law. Equitable set-off is where, by reason of the nature of the cross demand, there can be no set-off at law. Here the demand is purely legal.

Motion refused, with costs.[1]

[1] Where there are cross demands between two parties of such a nature that, if both were recoverable at law, they would be the subject of legal set-off, then, if either of the demands is matter of equitable jurisdiction, the set-off will be enforced in equity; *Clark and others v. Cort*, 1 Craig & Phillips, 154. Equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand; the mere existence of cross demands is not sufficient; still less will the court interfere on the ground of equitable set-off to prevent a party from recovering a sum awarded to him by a jury as damages for a breach of contract, merely because there is an unsettled account pending between him and the party against whom the action is brought, although the subject matter of the action consists of dealings and transactions arising out of the contract, the breach of which is the subject of the action; *Russell v. Samuel*, 1 Craig & Phillips, 161. Where each party had a judgment against the other, and the court of king's bench refused to set off one against the other, it was, notwithstanding, allowed by the Vice-Chancellor, in *Williams v. Davies*, 2 Sim. 461; a decision which evidently does not meet the approbation of Lord Chancellor Cottenham; 1 Craig & Phillips, 159, 17d. Perhaps in no instance has a court of equity gone further in enforcing a set-off than in *Simpson v. Hart*, 14 Johns. Rep. 53; S. C. 1 Johns. Ch. Rep. 91. Where A. having recovered a judgment against B. & C. for an assault and battery, and B. having recovered a judgment against A. for an assault and battery, A. was allowed to set off the judgment recovered by him against B. & C., against the judgment of B., against A., the set-off having been refused in the court of law. See

1824.—Hibbert v. Cooke.

\*HIBBERT v. COOKE.

[\*552]

1824, 27th January.—*Tenant for life.*

Tenants for life of real estates under a will having expended money in finishing a mansion-house which the testator had begun, but left unfinished, and also in repairing the mansion-house which had been damaged by dry rot, the court, in a suit for administering the trusts of the will, directed an inquiry whether it was for the benefit of all parties interested that the mansion-house should be finished, but refused an inquiry as to the repairs; and said if it was found for the benefit of all parties interested, that the mansion-house should have been finished, and there was no personal estate applicable, the expense should be a charge on the real estates.

THIS was a bill to administer the trusts of the will of J. Cooke. Sarah Cooke the widow of the testator was one of the defendants. She was devisee for life of his real estates and of his residuary personal estate, with remainder to his son for life; with remainder to the son's children, absolutely, as tenants in common. The will directed the leasehold estates of the testator to be sold.

It appeared by the answer of the widow, that at the time of the testator's death he was engaged in building a new mansion-house which was then nearly finished, and that she had proceeded to complete it; and that she had afterwards expended a considerable sum in repairing it, in consequence of its being damaged by the dry rot. Her answer likewise stated that the leasehold estates of the testator had been underlet by him at small ground rents, on leases which had but few years to run at the time of his death and were for much shorter terms than his lease; and it would have been for her benefit, as tenant for life, had the leaseholds been sold immediately after the death of the testator; but that, with a view to the benefit of her son and his children, she, as an executrix under the will, had concurred in delaying the sale till the under-leases had expired, although by this delay her own income as tenant for life had been diminished. She therefore claimed to be entitled to compensation, out of the general residuary estate, in respect of the sums thus laid out \*by [\*553] her on the mansion-house, and also in respect of the diminution of her income by the delay in the sale of the leasehold estates.

The cause now came on to be heard; and the only question was as to these claims by the widow.

Mr. Hart and Mr. Tinney for the plaintiffs.

Mr. Heald and Mr. Purvis for the defendant, the widow, mentioned the case of *Graves v. Graves*, at the rolls in March 1822, in which an inquiry was directed as to sums expended by a widow, tenant for life, in effecting substantial repairs on the mansion-house. The registrar's books had been searched to ascertain what had been done on the master's report in that case; but no

further, *Amer. Ch. Digest, Set-off, II.* Where cross demands exist between two parties, one of whom is proceeding by action at law, and the other by a suit in equity for an account and payment, the court of equity, although it may be of opinion that the facts of the case entitle the plaintiff in equity to have one demand set off against the other, will not give that relief unless it is distinctly prayed for by the bill; *Rawson v. Samuel*, ubi supra.



1824.—*Naylor v. Winch*

further entry appeared beyond the order which directed the reference to the master to make the inquiry as to the sums expended.

Mr. *Wray*, *amicus curiæ*, stated that he was one of the counsel in the case of *Graves v. Graves*; and that the inquiry had been directed in that case to ascertain the amount, in order that the widow might obtain a security by way of mortgage of the estates.

Mr. *Horne*, Mr. *Roupell*, Mr. *Spence* and Mr. *Theobald* for the various other parties, defendants, interested under the will, did not oppose an inquiry.

The Vice-Chancellor referred it to the master to inquire whether it was for the benefit of all parties interested in the testator's estate that the mansion-house should have been finished; and if so, then to inquire what had [\*454] been properly expended by the \*widow in that respect. And also to inquire whether it was for the benefit of those who might become entitled to the residuary personal estate after the death of the widow, that the sale of the leasehold estates should be delayed until the expiration of the under-leases granted by the testator; and in case the trustees should find that the delay was for their benefit, he was to inquire further, what compensation the widow would be entitled to in respect of her loss of income by the delay of sale from the death of the testator until the present time; and what she would be further entitled to in respect of her future loss of income from the present time until the expiration of the under-leases.

But his honor refused to make any order with respect to the expense occasioned by the dry rot, considering that it was an expense to which a tenant for life choosing to occupy a mansion-house, must submit. And his honor also observed, that upon the principle of this order he must have directed the inquiry, even if there had been no personal estate applicable to satisfy the expense; and must have directed the expense to be a charge upon the real estate.[1]

[\*555]

\*NAYLOR v. WINCH.

1824, 27th, 28th, 29th January.—*Annuity.—Agreement.—Mistake.*

The court cannot inquire into the adequacy or inadequacy of the consideration of a compromise fairly and deliberately made.

*Quere.* Whether the rule, that a trustee cannot purchase from his *cestui que trust*, prevails where the relation of trustee gives no advantage.

Where a compromise of a doubtful claim is entered into fairly, with due deliberation, and upon consideration, the court will not inquire into the adequacy of the consideration.

JOHN WINCH, by his will, dated the 8th of March, 1796, bequeathed to the plaintiff, then the wife of R. Mealy, an annuity of 600*l.* per annum, to com-

[1] *Vide Nairn v. Majoribanks*, 3 Russell, 582.

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mence six months after his decease, for her life, and the issue from her body lawfully begotten; in failure of which to revert his heirs; and he requested his friends, N. E. Kindersley and T. Cockburn, to act as trustees for her, so that the annuity might be secured for her sole use and benefit, and that it might be paid to her quarterly, or half-yearly, as they might deem proper; and he appointed his brothers, George Winch and James Winch, his executors and residuary legatees.

The testator died soon after the date of his will; and the executors proved it in the mayor's court at Madras Patnam, where the testator and the plaintiff were resident at the time of making his will, and of his death.

By an indenture dated the 8th of March, 1798, made between the executors of the one part, Adrian and John De Fries of the second part, and Mr. Kindersley and Mr. Cockburn, the trustees for the plaintiff under the will, of the third part, after reciting the will, and that Mr. Kindersley and Mr. Cockburn had declined accepting the trusts of it for a longer period than the natural life of the plaintiff, the executors assigned to A. and J. De Fries, their heirs, executors and administrators, the sum of 20,000 star pagodas part of \*the testator's estate, upon trust to pay, out of the interest and pro- [\*556] duce of that sum, the annuity of 600*l.* to Mr. Kindersley and Mr. Cockburn, their heirs, executors or administrators, for the sole use and benefit of the plaintiff during her life; and, after her decease, to repay the principal sum of 20,000 star pagodas to the executors, who thereby bound themselves, their heirs, executors or administrators, upon such repayment, to cause the said annuity of 600*l.* to be paid to such issue of the body of the plaintiff as should or might be lawfully begotten during the time of his, her or their natural lives, or the lives of the survivor or survivors, to each an equal part or share, with benefit of survivorship, agreeable to the true meaning and intent of the will, in such manner as they would have been bound to do if that deed had not been made. It was also provided by this deed, that if the executors should find it advantageous to the estate to remit the principal sum of 20,000 pagodas to England, and to place the same in the public funds, with such other and further sum as might be sufficient to produce an interest equal to the annuity, it should be lawful to the parties to enter into such other and further agreement as might be requisite for that purpose.

The plaintiff, as well as her trustees and the executors, were, at the time when this deed was executed, resident in India; and although she was not made a party to the deed, she was privy to it, approved of it, and acted under it.

In the year 1799, the executors came to England, and proved the will in the prerogative court of Canterbury. In 1808, the plaintiff being then a widow, intermarried with Mr. H. Naylor.

\*By the settlement dated the 16th of December 1808, made in con- [\*557] templation of this marriage, the plaintiff assigned to Mr. Kindersley

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and Mr. Cockburn and two other gentlemen the annuity of 600*l.* "given and bequeathed by the will of the said John Winch to or in trust for her and the issue of her body," upon trust to pay the same to the plaintiff herself, for her life, for her separate use; and, after her decease, "upon the trusts by the will of the testator directed and declared of and concerning the same."

In 1809, the trustees under this settlement filed a bill in this court against the executors, the plaintiff and her husband, and a child of the marriage then born, for the purpose of compelling the executors to vest in the English funds as much money as would produce the annuity of 600*l.*; and in this bill it was suggested that the plaintiff claimed to be entitled to the annuity, not for her life only, but absolutely. In the deed of 1798, and in the marriage settlement of 1808, it had been taken for granted that the plaintiff was entitled for life only. The executors had refused to make the investment required in the English funds, inasmuch as it would occasion a great loss to them as the residuary legatees of the testator's estate; and they also insisted upon a right to compel the plaintiff to accept her annuity from the 20,000 star pagodas in India, according to the deed of 1798.

In March 1812, it was agreed between the plaintiff, her husband, the trustees, and the surviving executor, (the other executor being then dead,) that upon a proper investment being made in the public funds of Great Britain for answering the annuity of 600*l.* the suit instituted in 1809 should be [\*558] terminated \*and the bill dismissed. Accordingly a deed dated the 23d of March 1812, between the plaintiff and her husband of the first part, the trustees of the settlement of 1808 of the second part, and the surviving executor of the third part, was prepared and duly executed by all parties. This deed, after reciting the various circumstances already mentioned, recited that "doubts were entertained respecting the true construction and effect of the testator's will in certain contingencies;" and that it had been agreed to invest a sufficient sum in the funds of Great Britain, for the purpose of securing the annuity upon all the trusts declared concerning the same in the will of the testator, "except so far as the said trusts are altered by virtue of these presents;" and also reciting that the executor had accordingly invested the sum of 12,000*l.* navy five per cent annuities in the joint names of himself and another trustee named by him, and of Mr. Kindersley and Mr. Cockburn, witnessed that, for declaring the trusts of the sum of 12,000*l.* navy five per cent annuities so invested, it was declared and agreed by all the parties that the trustees in whose names that sum was invested should stand possessed thereof in trust to pay the dividends thereof to the plaintiff for life, for her sole and separate use, in satisfaction of the annuity of 600*l.* and in lieu of all interest in the 20,000 star pagodas, and, after her decease, to stand possessed of the capital sum of 12,000*l.* navy five per cent annuities, upon the trusts and for the intents and purposes created by the testator concerning the annuity of 600*l.* "except so far as the same trusts were varied by the assignment thereby made by the plaintiff and her husband of all their interest, in any event, contingency or possibility

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in the capital sum of 12,000*l.* five per cent annuities after the decease of the plaintiff, whether such right or \*interest should vest in the plaintiff and her husband in their own right, or as representative of any of her children, or by any other means whatsoever;” and it was thereby provided that, in case the plaintiff’s husband should survive her, and the executor should on her death become entitled, by virtue of the testator’s will or otherwise, for his own use, to any part of the capital sum of 12,000*l.* navy five per cents, then that a sufficient part thereof should be conveyed to trustees, in order that the plaintiff’s husband should receive out of the dividends an annuity of 300*l.* for his life; and the plaintiff and her husband accordingly assigned to the executor, absolutely, all right and interest in the 12,000*l.* navy five per cents that might accrue to them in any event after the death of the plaintiff, or in right of representation to any of the plaintiff’s children. [\*559]

The plaintiff’s husband died sometime before the present bill was filed by her against the surviving executor, the trustees of the settlement of 1808, the trustees under the deed of 1812, and the children of the plaintiff praying to have it declared that she took an absolute interest in the annuity of 600*l.* under the will of the testator, and to have transferred to her the capital sum of 12,000*l.* navy five per cent annuities.

Mr. *Horne* and Mr. *Kindersley*, for the plaintiff:—

I. Under the will the plaintiff must be held to be absolutely entitled to the annuity; and, as the deed of compromise proceeded upon a mistake as to the nature of her interest in the annuity, she cannot be bound by it. The interest which the plaintiff took in the annuity under the will was an estate in the nature of a fee \*simple conditional at common law. *Turner v. Turner*. [\*560] *Turner*.(a) The only difference between the bequest in that case and the present, is that the testator here uses the words “issue from her body.” These words used in a will of real estate would give an estate tail, or a fee simple conditional before the statute *de donis*; and, as an annuity is not a species of property within the operation of that statute, the plaintiff must be held to take this annuity as a fee simple conditional. The nature of such an annuity issuing out of the general personal estate of a testator is, according to the expression of Lord Loughborough in *Turner v. Turner*, personal only as to its remedy, but real as to its descent. A real interest is created in personal property by the gift of an annuity with words of inheritance, just as a personal interest is given out of real estate by a term of years. The interest which a husband takes in an annuity given to his wife as a fee conditional, is different from that which he takes in personal estate given to his wife. Therefore, where a woman is entitled to a fee simple conditional in an annuity, and she dies leaving a son, her husband, though he survives, can not be entitled to any interest in the annuity. There are many cases in which it has been held that, where parties mistake their interests, the court will relieve against a com-

(a) 1 Bro. C. C. 323.

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promise entered into under the mistake. In the present case it is plain that the plaintiff was ignorant of the extent of the interest which she had in this annuity, and could not intend to give up a perpetuity in the annuity, because she did not know that she was entitled to a perpetuity in it. By the deed of 1798 the parties took upon themselves to declare what were their [\*561] rights under the will, and mistook the nature of \*the plaintiff's interest in the annuity. Upon that mistake all the subsequent deeds were founded, for they all proceed on the notion that the plaintiff was entitled only to a life interest in the annuity.

II. The mistake in this case is of such a nature as the court will relieve against. It is not necessary that there should be fraud or concealment in order to obtain relief against deeds entered into by parties who mistook their rights in the property affected by them. The doctrine of the court, as established by many cases, is that, if parties enter into a deed under a mistake as to their rights, this court will relieve them and rescind the deed. *Pooley v. Ray*; (b) *Hitchcock v. Giddings*; (c) *Farewell v. Coker*; (d) *Turner v. Turner*; (e) *Lansdowne v. Lansdowne*; (f) *Bingham v. Bingham*; (g) *Pusey v. Desbouverie*. (h) The deed of 1812 contains in itself sufficient evidence that the plaintiff executed it under a mistake as to her right. That deed recites the deed of 1798, which states the plaintiff to have a life interest in the annuity. No passage in the deed of 1812 contains any thing to show that any notion of the plaintiff's rights was then entertained different from that expressly stated in the deed of 1798, excepting these words: "And whereas doubts being entertained respecting the true construction and effect of the will of the said John Winch in certain contingencies." The words in 'certain contingencies' show that the doubts referred to some other possible [\*562] right which the parties fancied might arise upon the construction \*of the will. It could not mean that the doubt was as to the extent of the plaintiff's right in certain contingencies, because her right did not depend upon any contingency. At that time she had two children born, and her interest in the annuity had become absolute.

III. The inadequacy of the consideration in the present case is evidence that the plaintiff did not know what the extent of her rights was at the time when she executed the deed of 1812.

IV. The person who made the compromise with the plaintiff by the deed of 1812, was the executor, who was himself a trustee for the plaintiff who was at that time a married woman, and was not therefore competent to enter into such an arrangement with her. It was his duty to protect her interests under the will in the property which was given to her separate use.

(b) 1 P. W. 355.

(e) 4 Price, 125.

(d) Cited by Sir William Grant in *Cholmondeley v. Clinton*, 2 Meriv. 252.

(c) 2 Cha. Rep. 81.

(f) Moseley, 351.

(g) 1 Ves. 126.

(h) 3 P. W. 315.

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V. Another class of cases which may be applied to the present is that in which the court has held that, where general words have been used in a deed which extend to include matters not within the contemplation of the parties or the amount of the consideration, the operation of the general words was to be restrained to the particular object expressed to be within the view of the parties. *Ramsden v. Hilton*,<sup>(i)</sup> is a case very nearly approaching to the present; for the court there held that, in a deed executed between a brother and sister, a general release was not binding as to rights of which the parties were ignorant at the time. The same principle was acted on in *Cole v. Gibson*.<sup>(k)</sup> In *Cann v. Cann*,<sup>(l)</sup> Lord Macclesfield says, "If the party \*releasing is ignorant of his right, or if his right is concealed from him [\*563] by the person to whom the release is made, there will be good reasons for the setting aside of the release." In *Gibbons v. Caunt*,<sup>(m)</sup> Lord Alvanley said, "No man can doubt that this court will never hold parties acting upon their rights (doubts arising as to those rights,) to be bound, unless they act with full knowledge of all the doubts and difficulties that arise."

Mr. Wigram, for the trustees.

Mr. Sudgen and Mr. Collinson, for the defendants, the infant children of the plaintiff:—

I. It is by no means clear that the plaintiff can be held, on the true construction of this will, to take an absolute interest in this annuity. The words of the will are very peculiar, and import that the gift was to the plaintiff for her life, and to her issue, if she should leave any living at her death. The question is, whether the word issue here is to be taken as a word of limitation or of purchase. The words in *Knight v. Ellis*<sup>(n)</sup> are nearly the same as in this will; and there it was held that 'issue,' was a word of purchase. The case of *Warman v. Seaman*,<sup>(o)</sup> as stated by Mr. Fearne,<sup>(p)</sup> is almost exactly this case; for he says that a devise of a term to A. for life, and afterwards to his issue, does not enlarge the estate to A. But on referring to the report of the case it does not exactly bear out that statement.

II. If, however, the plaintiff is to be considered as the absolute owner of this annuity under the will, \*the deed of 1812 has bound all [\*564] her interest in it; and then the deed declares that the trustees are to stand possessed of the 12,000*l.* five per cents, after the plaintiff's death for the benefit of the persons entitled under the will.

Mr. Heald and Mr. Simpinson for the defendant Winch, the executor:—The doubts which existed as to the extent and nature of the interest which the plaintiff took in the annuity under the will, formed an adequate considera-

(i) 2 Ves. 304.

(k) 1 Ves. 506.

(l) 1 P. W. 727.

(m) 4 Ves. 849.

(n) 2 Bro. C. C. 569.

(o) 2 Cha. Ca. 208.

(p) Fearne, Con. Rem. 6 edit. 495.

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tion for the compromise which was effected by the deed of 1812. No case of fraud is made out by the plaintiff; and there was no mistake to enable the court to say that the deed of 1812 ought to be set aside. That deed was settled under the best legal advice on behalf of all parties: there was nothing like surprise; and the rights of all the parties to that deed must be held to be bound by it. If, as was contended on behalf of the children, the plaintiff took only a life estate, then it is plain that the executor was a very considerable loser on this compromise, which proceeded upon the notion that the plaintiff had something more than a mere life estate in the annuity. The construction of the will admitted of doubt; that doubt was a sufficient consideration for the compromise, and the deed of compromise is unimpeachable.

The VICE-CHANCELLOR, [after stating the facts of the case:]—If a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another under the name of compromise, a court of equity will relieve him from the effect of his mis- [\*565] take. But where a doubtful question arises, such as this question of construction upon the will of the testator, it is extremely reasonable that parties should terminate their differences by dividing the stake between them, in the proportions which may be agreed upon. [1] In this bill it is generally alleged that the plaintiff was fraudulently drawn into this deed. But that allegation is totally unsupported by evidence; and on the contrary it is proved, by the defendant the executor, that the transaction of the compromise proceeded upon great deliberation on the part of the plaintiff, her husband, and her trustees; and that the deed was settled on behalf of all parties, by one of the most respectable names in the profession, the late Mr. Shadwell.

It is said that there was either no consideration passing to the plaintiff, or a consideration grossly inadequate. That there was a consideration is quite clear—the investment of the 12,000*l.* navy five per cents in lieu of the 20,000 pagodas, and the payment of the costs of the suit in 1809, and the covenant for securing the 300*l.* a year to the husband for his life, if he should survive the plaintiff, out of any interest which the executor might acquire in the capital sum or stock, either by the assignment of the plaintiff and her husband, or otherwise howsoever.

Where a compromise of a doubtful claim is entered into fairly, and with due deliberation and upon consideration, a court of justice cannot inquire into the supposed adequacy or inadequacy of the consideration. Where is it to find a scale for determining the true measure of adequacy? If a court is in such a case to be governed by its judicial opinion upon the rights of [\*566] the parties, then, to him who by that opinion is held to be entitled to the whole property, no consideration can be really adequate which is less than the whole, and no compromise can ever bind the successful claimant. It is for this reason, and because I consider it to be wholly immaterial for the

[1] *Vide Zane's Devises v. Zane*, 6 Munf. 406.

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purpose of deciding upon the validity of the deed of compromise, that I do not give any opinion upon the arguments by which the counsel for the plaintiff assert her claim to the perpetual annuity. It is enough to support this deed, that there was a doubtful question and a compromise fairly and deliberately made upon consideration; and the actual rights of the parties, whatever they might be, cannot affect the question.

It is said, in respect of the nature of the property and of the situation of the plaintiff as a married woman, that this deed will not have the beneficial effect in favor of the executor which was intended by it. But assuming this to be so for the sake of argument, does it form any reason why, at the request of the plaintiff, the deed is to be declared void? If the plaintiff, by reason of some incapacity on the part of the executor, had not the full benefit for which she contracted, she might with reason challenge the deed. But if the defendant is willing to stand by the deed as it is, can she take from him what it may actually give him, because the bargain is less beneficial to him than she intended it.

It is next contended that the executor was a trustee for the plaintiff, and incapable therefore, upon principles of general policy, of dealing with his *cestui que trust*, in respect of the trust property. An executor is in an artificial sense a trustee for every legatee until the legacy is paid or invested. But it is at least \*doubtful whether, under the circumstances [\*567] of this case, the trust, in that artificial sense, was not determined. The material dispute between the parties was whether the investment of the 20,000 pagodas was not, as to the plaintiff and her actual trustees, a satisfaction of the annuity; and this, not in respect of the state of the assets of the testator, (for there the executor might be considered a trustee,) but in respect of the contract of the plaintiff and her trustees which the executor insisted gave to him a personal benefit as residuary legatee.

Where the policy of this court prevents a trustee from dealing with his *cestui que trust*, it is upon the principal that his situation as trustee gives him an advantage in such dealing. If this executor could in any sense be called a trustee, yet, inasmuch as here was no question of assets, and as the dealing proceeded entirely upon his character of residuary legatee, it is impossible that he could derive any advantage in dealing with the plaintiff and her trustees from his character of executor.[1]

Bill dismissed, with costs.

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The Vice-Chancellor said that his reason for giving the defendant costs was that the plaintiff did not seek to avoid this compromise until after the death of her husband, whereby one of the considerations to the plaintiff had failed.

[1] Vide Amer. Ch. Digest, Trusts, VII. Executors, III.



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[\*568]

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1824, 29th January.—*Waste.—Statute of limitations.*

If a tenant for life has rendered accounts to the remainder-man of timber cut by him during a period of more than six years before a bill is filed against him for an account of such timber and of the value of it, the statute of limitations cannot be pleaded to the bill; for though, if the remainder-man had brought an action of trover, the tenant for life might, notwithstanding the rendering of the accounts, have pleaded the statute, he could not have done so if the remainder-man had brought an action of assumpsit.

THE bill stated that the reverend John Hony, the late grandfather of the plaintiff, by his will, after giving certain parts of his real estates to his son William Hony, since deceased, the plaintiff's late father for life, and to his issue in strict settlement, gave all his other lands and tenements and hereditaments to certain persons therein named, in fee simple, to the use of his son, the defendant John Hony, and his assigns, for his natural life; with remainder to trustees to preserve contingent remainders; with remainder to his first and other sons in tail; with remainder to the use of William Hony and his assigns, for his natural life; with remainder to trustees to preserve contingent remainders; with remainder to his first and other sons in tail: that the testator left him surviving his sons William Hony and John Hony: that the testator died in or about the year 1767: that, at the death of the testator, John Hony was an infant of the age of sixteen years, or thereabouts: that, upon the death of the testator, some person, on behalf of John Hony, entered into the possession or receipt of the rents and profits of the hereditaments and premises devised to him for his life; and that, upon his attaining the age of twenty-one years, which he did in the year 1772, he, in his right, entered into the possession and into the receipt of the rents and profits of the premises so devised to him for his life: that John Hony was a bachelor: that William Hony, the plaintiff's father, died in 1795 leaving the plaintiff his eldest son and heir at law: that, in manner aforesaid, subject to the life estate of John Hony, the plaintiff was tenant

[\*569] in \*tail general of the premises devised to John Hony for his life, and would as such, upon the death of John Hony, be entitled to the possession thereof, in case John Hony should die without leaving any child: that, at the time of the death of the testator, or prior to the year 1794, there were divers large timber and timber-like and other trees growing upon the premises devised to John Hony for his life, and which were of considerable value: that John Hony, notwithstanding he was tenant for life only of the same premises, prior to the year 1794, caused divers large quantities of such timber and timber-like and other trees to be cut down and sold, and received the money arising from such sale, and applied the same to his own use: that, in and since the year 1794, John Hony had cut down and sold divers other large quantities of such timber and timber-like and other trees growing upon the same premises, and had applied the money arising from such sale to his own use: that

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the plaintiff had only lately discovered that John Hony had done so, and that he was not entitled so to do; and, soon after the plaintiff had made such discovery, he caused applications to be made to John Hony, that he would render to him an account of the number of timber and timber-like and other trees which he the said John Hony had cut or caused to be cut down from the premises devised to him for life, and for the value thereof and interest on the value thereof, and that the same should be laid out and accumulated to be paid to the plaintiff in case John Hony should die without leaving any issue; but John Hony had refused to do so; and although he had rendered some account of the sums produced by the sale of the timber so cut or caused to be cut down by him, making the same amount, from the \*year 1794 to the year 1821, both inclusive, to 1,601*l.* 4*s.* 4*d.* yet [\*570] the plaintiff charged that such account was very inaccurate, and that the timber and timber-like and other trees which were cut or caused to be cut down by John Hony from the premises, between the year 1794 to 1821, both inclusive, were of much greater value, and were sold by him for sums exceeding 1,601*l.* 4*s.* 4*d.*; and, as evidence thereof, the plaintiff charged that he had lately caused inquiries to be made of the sums of money for which John Hony, in and since the year 1794, had sold and disposed of the timber and timber-like and other trees cut down by him as before mentioned; in answer to which inquiries the plaintiff received certain accounts, and from which accounts and the accounts furnished to the plaintiff by John Hony as aforesaid, it appeared, so far as the same account extended, and as the plaintiff charged the fact to be, that, in and since the year 1794, and down to the year 1821, the timber and timber-like and other trees cut or caused to be cut by John Hony from the premises in each year in which it appeared by such accounts that timber was cut, were sold by or for John Hony for the sums following; (that is to say,) in 1794, the sum of 512*l.* 10*s.*; in 1804, the sum of 10*l.*; in 1806, the sum of 10*l.* 10*s.*; in 1807, the sum of 916*l.*; in 1808, the sum of 18*l.* 5*s.*; in 1809, the sum of 160*l.*; in 1812, the sum of 545*l.*; in 1813, the sum of 268*l.*; in 1814, the sum of 528*l.*; in 1815, the sum of 150*l.*; in 1818, the sum of 9*l.* 18*s.* 4*d.*; in 1821, the sum of 126*l.* 3*s.*; which several sums amounted to the sum of 3,254*l.* 6*s.* 4*d.* The plaintiff further charged that, in addition to the sums mentioned in these accounts, John Hony, in and since the year 1794, had cut or caused to be cut down \*divers other large quantities of timber and [\*571] timber-like and other trees from the premises devised to him for life; and that so it would appear, if John Hony would set forth a full and particular account of all the timber and timber-like and other trees which, in each year in and since the year 1794, he had cut or caused to be cut from the premises; and to whom and for what sums the same were sold: that there were then growing, upon the premises devised to John Hony for his life, divers large timber and timber-like and other trees, which he threatened to cut down.

The bill then charged, in the usual manner, that John Hony had, since the

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year 1794, kept accounts of the timber and timber-like and other trees cut down by him from the premises, and the prices for which the same were sold, and that he had such accounts in his possession or power, as also divers other papers relating to the matters in the bill mentioned, and that he ought to set forth a list or schedule thereof.

The bill prayed that an account might be taken of all timber and timber-like and other trees which in and since the year 1794 had been cut or caused to be cut down by the defendant from the premises devised to him for life and of the value thereof in each year; and that the defendant might be decreed to pay what should be so found to be the value thereof, together with interest thereon, from the time at which he received or might have received such value; that the sums which should be so found due from the defendant might be laid out in the name of the accountant general in trust in the cause, and accumulated for the benefit of the person or persons who might be entitled thereto [\*572] upon the death of the defendant; \*that, in case the defendant should not leave any child living at his death, such sums, together with the accumulations thereon, might be decreed to be paid to the plaintiff; and that, in the meantime, the defendant might be restrained from cutting down, lopping or injuring any timber and timber like and other trees growing upon the premises.

To this bill the defendant put in a plea and answer. The plea was as follows:—"This defendant not confessing, &c. as to so much of the said bill as seeks that this defendant should discover and set forth whether this defendant did not, prior to the year 1794, cause divers large quantities of timber and timber-like and other trees, growing in and upon the hereditaments and premises devised by the testator in the said bill named, to this defendant for his life, as in the said bill mentioned, to be cut down and sold from and off the said hereditaments and premises; and whether this defendant did not receive the money arising from such sale; and whether in and since the year 1794, and more than six years before the filing of the said bill of complaint, this defendant had not cut or caused to be cut down divers other large or some quantity of such timber and timber-like and other trees growing upon the said hereditaments and premises; and whether he had not sold the same, and received the moneys arising from such sale; and whether he had not applied such moneys to his own use; and whether so much of the account in the said bill mentioned to have been rendered by this defendant to the said plaintiff, as related to timber and timber-like and other trees growing upon the said hereditaments and premises, cut by defendant more than six years prior to the filing of [\*573] the said bill, was not very or in some degree inaccurate; \*and whether the timber and timber-like and other trees in the bill alleged to have been cut or caused to be cut down by this defendant, from and off the hereditaments and premises, between the years 1794 and 1821, and more than six years prior to the filing of the bill, were not of much greater value, and were not sold by this defendant for sums exceeding, and how much, the sum of

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1,601*l.* 4*s.* 4*d.* in the bill mentioned ; and whether the timber and timber-like and other trees by this bill alleged to have been cut or caused to be cut by this defendant, from and off the hereditaments and premises, in the several years following, were not sold by or for this defendant for the sums respectively following ; that is to say, in 1794, for the sum of 512*l.* 10*s.* ; in 1804, for the sum of 10*l.* ; in 1806, for the sum of 10*l.* 10*s.* ; in 1807, for the sum of 916*l.* ; in 1808, for the sum of 18*l.* 5*s.* ; in 1809, for the sum of 160*l.* ; in 1812, for the sum of 545*l.* ; in 1813, for the sum of 269*l.* ; in 1814, for the sum of 528*l.* ; in 1815, for the sum of 150*l.* ; or for any other and what sums ; and whether, in addition to the sums in the said account mentioned, this defendant had not, in and since the said year 1794, and more than six years prior to the filing of the said bill, caused to be cut down divers other large or some quantities of timber and timber-like and other trees from and off the said hereditaments and premises so devised to him for life as aforesaid ; and also as to so much of the said bill as seeks that this defendant may set forth a full and particular account of all the timber and timber-like and other trees which in each year in and since the year 1794, and more than six years prior to filing of the said bill, this defendant has cut or caused to be cut from and off the said hereditaments and premises, and when \*and to whom the same was or were sold, and [\*574] for what sums of money ; and whether this defendant had not since the year 1794, and more than six years prior to the filing of the bill, kept books of account or memorandums in which he had made entries of the quantity of timber and timber-like and other trees cut by him from and off the said hereditaments and premises more than six years prior to the filing of the said bill, the time when such timber and timber-like and other trees were cut, the names of the persons to whom, and the sums for which the same was or were sold, or containing some and which of such particulars ; and whether this defendant hath not or had not, and when last, in his possession or power such or the like books of account and memorandums, and whether or not also divers other papers, writings, documents and letters, or copies of letters, relating to the matters aforesaid, or some of them, more than six years before the filing of the said bill ; and also to so much of the said bill as seeks that this defendant may set forth a list or schedule thereof, and produce and leave the same in the hands of his clerk in court for the usual purposes ; and may set forth what is become of such of the aforesaid particulars, if any, as were or was but which are not or is not now in his possession or power ; and also to so much of the said bill as seeks that an account may be taken, under the direction of this court, of all timber and timber-like and other trees which in and since the year 1794, and more than six years prior to the filing of the said bill, have been cut or caused to be cut down by this defendant from and off the said hereditaments and premises so devised to him for life as aforesaid, and of the value thereof in each year ; and that this defendant may be decreed to pay what shall \*be so found to be the value of such timber and timber-like and other [\*575] trees so cut or caused to be cut by him as aforesaid, together with in-

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terest thereon from the time at which he received or might have received such value; and that the sums which shall be so found due from this defendant may be laid out in the name of the accountant general of this court, in trust in this cause, and accumulate for the benefit of the person or persons that may be entitled thereto upon the death of this defendant; and that, in case this defendant should not have any child living at his death, then that such sums, together with the accumulations thereon, may be decreed to be paid to the said complainant; this defendant doth plead in bar, and for plea saith that, by a statute made and passed in the 21st year of the reign of his late majesty king James the first, entituled: "an act for limitation of actions, and for avoiding of suits at law," it is enacted, that all actions of trespass *quare clausum fregit*, all actions of trespass, action *sur trover* and *replevin* for taking away of goods and cattle, all actions of account and upon the case, other than such accounts as concern the trade and merchandize between merchant and merchant, their factors and servants, and all actions of debt grounded upon any lending or contract without specialty, which shall be sued and brought at any time after the end of this present session of parliament, shall be commenced and sued within three years after the end of this present session of parliament, or within six years next after the cause of such actions or suit, and not after. And this defendant doth aver that the said bill was filed in this honorable court on or about the 1st day of February last. All which matters and things this de- [576] fendant doth aver \*and plead to so much of the said plaintiff's bill as hereinbefore particularly mentioned; and prays, &c."

The answer admitted that the testator made his will and died as stated in the bill, and that he left him surviving his sons, the defendant and William Honey; that at the death of the testator the defendant was an infant of the age of sixteen years or thereabouts; that, on the death of the testator, his widow, on behalf of the defendant, entered into possession or into the receipt of the rents and profits of the premises devised to the defendant for his life, and managed the same until the defendant attained his age of 21 years, in the year 1772, when the defendant entered into the possession thereof or into the receipt of the rents and profits thereof; that the defendant was a bachelor: that William Hony attained the age of 21 years in the year 1775, and died about January, 1795, and left him surviving the plaintiff, the eldest son and heir at law. But the defendant did not admit that the plaintiff was the heir at law of William Hony. The answer also admitted that subject to the defendant's life-interest, the plaintiff was tenant in tail general of the premises devised to the defendant for his life, and would, upon the defendant's death, as such, be entitled to the possession thereof, in case the defendant should die without issue: that there were divers large timber and timber-like and other trees growing upon the premises devised to the defendant for his life, and that such timber and timber-like and other trees were of considerable value: that since the year 1794, and within six years prior to

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the filing of the bill, the defendant had cut or caused to be cut down some timber and \*timber-like and other trees growing upon the pre- [577] mises, and had sold the same and received the money arising from such sale, and had applied such moneys to his own use: that at the time when he so cut and sold the trees, and until he was advised to the contrary, shortly before the filing of the bill, he verily believed he was legally entitled so to do. The answer denied that the plaintiff had lately discovered that the defendant had lately cut and sold trees growing on the premises, for that the same were not clandestinely cut or sold, and the defendant believed that the plaintiff was apprised thereof at or shortly after the time of the sales: that some time in or about the early part of the year 1822, the plaintiff's solicitor addressed several letters to the defendant's solicitor requiring an account of the timber cut by the defendant from the premises: that in or about the month of May, 1822, the defendant caused to be sent to the plaintiff's solicitor a statement of the sums received by the defendant for sales of timber and timber-like and other trees cut from the premises in and since the year 1794, to the year 1821 inclusive, amounting in the whole to the sum of 1,601*l.* 4*s.* 4*d.*: that at the time when this statement was prepared and delivered, the defendant believed the same to be accurate, but that he was then in a state of dangerous indisposition, and was thereby prevented examining the books in which entries of the sales were made with a due degree of attention, and the defendant now believed that the statement was inaccurate, and that the timber and timber-like and other trees cut from the premises by the defendant within six years prior to the filing of the bill were of greater value than they by the statement were represented to be, and were sold by the defendant for sums exceeding those specified in the statement.

\*The defendant in a schedule to his answer set forth accounts of [578] the timber and timber-like and other trees which he had cut or caused to be cut from the premises, and of the moneys he had received from the sale thereof.

*Mr. Heald* and *Mr. Swanston*, in support of the plea:—The question is, whether a person having a life interest only, and having cut timber on the estate can be called upon to account in a court of equity for a greater period than six years.

This is not a case of equitable waste. In that case the court might extend the account to a period of twenty years; because equitable waste is a breach of trust reposed by the testator in the tenant for life. We admit that the action of waste is not within any statute of limitations. But no proceeding in equity can be analogous to the penal action or in aid of it. The accounts rendered would not prevent the operation of the statute on an action of trover. The cause of action, namely, the tort, must be within six years. Subsequent ac-

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knowledge of prior torts are nugatory. In actions of assumpsit these acknowledgments are themselves causes of action as new assumpsits.

The plaintiff seeks an equitable remedy for a legal right. Since he became enant in tail immediately expectant on the defendant's estate for life, he might at all times have recovered damages for waste in an action of trover, notwithstanding the possibility of prior estates of inheritance. *Udal* [\*579] *v. Udal*; (a) *Skelton v. Skelton*; (b) *Whitfield v. Bewit*; (c) *Bewick v. Whitfield*. (d) Upon what foundation have courts of equity assumed jurisdiction to give the remedy of account for merely legal waste? Interposing their peculiar preventive process of injunction, they proceed to take the account on the single principle of preventing multiplicity of suits. *Jesus College v. Bloom*; (e) *Smith v. Cook*. (f) Why is the plaintiff to come into this court to pray an injunction, and thereby get an account more extensive than he could have had at law? If he had resorted to a court of law he must have brought an action of trover, and then the account would have been confined to six years. For the statute of limitations is a good plea to an action of trover. The account must, therefore, be commensurate with the relief given at law in the action of trover, and the plea of the statute of limitations must be a good bar to a bill for an account of waste. To give extended relief would be to proceed on some other principle than the mere policy of preventing circuity of action.

Even if courts of equity entertained a bill for an account of legal waste as the subject of distinct substantive jurisdiction, they must be confined within the same limits as courts of law. The plaintiff's claim is merely legal. He suggests no equity to entitle him to any peculiar relief in this court. In a much stronger case a plea of the statute has been allowed. *Lockey v. Lockey*. (g) A court of equity could not, on the same facts, at once refuse an injunction and direct an account. That would be to abandon its own peculiar [\*580] jurisdiction, while it invaded the province of courts of law. No injunction would be granted on acts of waste committed more than six years before the filing of the bill. *Barry v. Barry*. (h) With what consistency then can an account be directed of those acts of waste?

Mr. Hart and Mr. Koe, for the plaintiff, said that the owner of the inheritance had three remedies for waste committed by the tenant for life; that he might either bring an action of waste, of trover, or for money had and received where the timber had been sold; and that, in the last of those actions, a new cause of action arose whenever an account of the timber cut and sold was rendered to the remainder-man; and that therefore the account rendered in this case prevented the statute of limitations from being a good bar to the relief prayed by the bill.

The VICE-CHANCELLOR :—It is clear upon the authorities that the plaintiff

(a) Aleyn, 81. (b) 2 Swan, 170, n. (c) 2 P. W. 240. (d) 3 P. W. 266. (e) 3 Atk. 262. (f) 3 Atk. 381; see also 6 Ves. 89; and 9 Ves. 346. (g) Prec. Ch. 518. (h) 1 J. & W. 561.

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might have elected to bring an action of assumpsit, and not trover, for the moneys had and received by the defendant from the sale of timber, and that the rendering of the account, as alleged by the bill, would have been an acknowledgment by the defendant, which, in the action of assumpsit, would have taken the case out of the statute of limitations. The plaintiff does not in this bill impeach the sale of timber as improperly or improvidently made by the defendant; and, though he prays an account of the value, it would be quite consistent with the case made by the bill that he should seek a decree for an account of the produce \*of the sales as truly representing the [\*581] value. I consider the bill here, therefore, as analogous to the action of assumpsit, and that the alleged render of the account defeats the plea of the statute of limitations.

Plea overruled.[1]

WILLIAMS v. PRICE.

1824, 9th February.—*Debtor and Creditor.*

Where a creditor takes from his debtor an assignment of a debt due from a third person as a security for his demand, and, by his wilful default the debt becomes irrecoverable, he must bear the loss.

By an indenture dated the 4th of February 1817, and made between Walter Price of the one part, and John Price of the other part, after reciting that Walter Price, in Hilary term 1816, obtained a judgment in the court of king's bench against James Price, in an action of debt upon a bond for 1,600*l.*, and that there was then due to Walter Price, for principal and interest upon the judgment, the sum of 520*l.*, and that Walter Price was indebted to John Price in the sum of 520*l.*, and, in order to secure to him the due payment thereof with interest, had proposed and agreed to assign the judgment, and all moneys due and owing to him by virtue thereof, to John Price in manner therein mentioned, Walter Price assigned to John Price the judgment and all money then due and to become due thereon, subject to a proviso that if Walter Price, his executors, administrators, or assigns, should pay to John Price the sum of 520*l.* with interest for the same at 5*l.* per cent, on the 4th of February 1818 then next, the indenture should become void; and Walter Price thereby covenanted with John Price that he, his heirs, executors or administrators would pay to John Price the 520*l.* and interest at the time before mentioned. \*In October 1818 Walter Price died, having ap- [\*582] pointed the plaintiffs his executors. In June 1818, the defendant sued out execution on the judgment against James Price, but in consequence of his attorney being then otherwise engaged, the execution was not put into the

[1] Cases in which equity pursues the analogy of the statute of limitations. Amer. Ch. Digest, Limitations, I.



1824.—*Williams v. Price.*

sheriff's hands; and, in August following, James Price paid to John Price 300*l.* in part payment of the 520*l.* and promised to pay the balance; upon which the defendant refrained from putting the execution into the sheriff's hands. No further payment being made on account of the debt, John Price, after many ineffectual applications had been made by him to James Price, caused another execution to be issued against him in April 1819 for the residue of the debt; but that execution having been issued in the name of Walter Price, no levy was made under it, because Walter Price was then dead. Some correspondence afterwards took place between John and James Price, and the latter having requested the former to give him further time for payment of the money due, and promise that it should be shortly paid out of the purchase money of an estate which he had contracted to sell, John Price agreed to give James Price further time for the payment of the debt. In Trinity term 1819, the remainder of the debt being still unpaid, John Price caused the judgment to be revived, and sued out execution; but, when it was sent down to be levied, he discovered that the effects of James Price were then in possession of the sheriff under executions at the suit of two other creditors, so that no levy was made under it. In November 1819 and January 1820, James Price then sent John Price two bills of exchange, one for 50*l.* and the other for 35*l.*, in further discharge of the debt. But these bills were both protested. John Price commenced an action against the plaintiffs, [\*583] the executors of Walter Price, upon the covenant contained in the indenture of assignment, to recover the remainder of the debt. Upon which the plaintiffs commenced this suit. The bill after stating that John Price, in consideration of the 300*l.* agreed, without the authority or knowledge of the plaintiffs, to allow James Price further time for payment of the residue of the debt, prayed that he might be perpetually restrained from proceeding in the action.

The cause now came on to be heard.

*Mr. Sugden* and *Mr. Knight* for the plaintiff:—In a case like the present, where a debtor assigns to his creditor a debt due to him from a third person, it is not necessary, in order to discharge the assignor, to prove such a giving of time by the assignee to the debtor as is required for the purpose of discharging a surety in a suit between him and the creditor. There it is necessary to show that the creditor has actually tied himself up from suing. Here it is only necessary to prove a general course of forbearance on the part of the assignee, during which the circumstances of the debtor have been failing, and the debt is ultimately lost. It appears, from the facts stated in the pleadings, that such was the conduct of the defendant in this case. Had he used due diligence it is quite clear that he might have received the whole of his debt. But he forebore to enforce payment until the defendant had become insolvent, and therefore must suffer from the effects of his own neglect. The case

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of *ex parte Mure*(a) is precisely in point, and completely decides this case. It appears from the correspondence that James Price \*sent the [\*584] defendant two bills of exchange for part of the money remaining due from him, and that those bills were presented and protested. Now, in all cases between principal and surety, the giving of a bill of exchange for any part of the debt is considered as a giving of time.(b) Relying, therefore, upon the authority of *ex parte Mure*, we submit that, under all the circumstances of this case, the plaintiffs are discharged from all liability under the covenant.

Mr. Heald and Mr. Simpson, for the defendant:—This is not a case in which a surety claims to be discharged on account of time having been given by the creditor to the principal debtor. But here the principal debtor says that he is discharged because the creditor gave time to the surety. This is a new case. The case of *ex parte Mure* does not apply; for there the debt due to Sir B. Turner from the Woodbridges exceeded the debt assigned by them to him; and the assignment in that case was an absolute assignment, in part payment of the debt. Here the assignment is made subject to redemption, and as a collateral security only. Lord Thurlow, C. in his judgment in that case, takes the distinction between an absolute assignment and an assignment by way of security only.

Besides the assignment, this deed contains an independent covenant on the part of Walter Price to pay the 520*l.* to the defendant. Consequently this defendant has two sureties for his money. It is quite clear that he might have resorted to both or either of the remedies that the deed gave him. It is \*alleged by the bill that this defendant sued out execution on the [\*585] judgment against James Price, that he took payment of 300*l.* from James Price, and then agreed to defer enforcing payment of the remainder for an indefinite time. Supposing this representation to be correct, he was not prevented from suing out execution the next moment. It was a mere *nudum pactum* for forbearance. The Lord Chancellor in delivering his judgment in *Wright v. Simpson*,(c) says, "as to the case of principal and surety, in general cases I never understood that, as between the obligee and the surety, there was an obligation of active diligence against the principal. If the obligee begins to sue the principal, and afterwards gives time, there the surety has the benefit of it." There is a similar decision in the court of king's bench, *The Trent Navigation Company v. Harley*.(d) There there was a laches of eight or nine years, and yet the court held that the surety was not discharged. In this case time was not given by the creditor to the principal debtor: for James Price was the surety. And it has been decided that dealing with the surety will not discharge the principal debtor. *Ex parte Gifford*.(e) Here the defendant had two concurrent remedies; and whilst dealing with James Price he might have brought an action on the covenant against

(a) 2 Cox, 63.

(c) 6 Ves. 734.

(b) *Samuell v. Howarth*, 3 Mer. 272,

(d) 10 East, 34.

(e) 6 Ves. 805.

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Walter. The case therefore is, as we conceive, simply a case of forbearance. For as to the bills of exchange, that have been alluded to, nothing is put in issue respecting them. It does not appear that they were given in consideration of the debt; but if they were, that could not vary the rights of [\*586] the parties. For \*these reasons we submit that the plaintiff has not made such a case as entitles him to the relief sought by his bill.

Mr. Knight, in reply :—The equity on which this bill proceeds is one relating solely to the circumstances in which the parties stand. If an assignee of a debt will, without consulting the assignor, deal with a debtor as his own, and will continue giving him indulgence from time to time when he is in declining circumstances, assuming, in the most unequivocal manner, and adopting the debt as his own by issuing three executions for the recovery of it, is he not to be answerable to the person who pledged the debt? It is not necessary, even in the case of principal and surety, to show that the time was given for a limited period, and therefore it cannot be necessary in the present case. With respect to the observations which have been made upon the bills of exchange, this bill contains the usual charge that the defendant has in his possession papers relating to the matters in question. He leaves these bills in the hands of his clerk in court, and therefore it is impossible for him to say that they do not relate to the matters in dispute. These bills too are referred to in the correspondence, and they were given for certain periods as purchases of the plaintiff's forbearance. It is impossible to distinguish this case from *ex parte Mure*. A security is only a security whatever may be its form. Whether a proviso for redemption is or is not introduced is of no consequence. It appears from the recitals of the deed in *ex parte Mure* that the assignment was intended to be a security. It was an absolute assignment indeed, but it was made [\*587] \*as a security only. If *ex parte Mure* is to be supported, it is \*impossible to distinguish this case from it, except that our case is much stronger in favor of the assignor. The case of *ex parte Gifford* has no application, for it was a case between co-sureties.

The VICE-CHANCELLOR :—The question here is, what is the degree of diligence which a creditor accepting from his debtor, by way of collateral security, the assignment of a judgment received by that debtor against a stranger, is bound to use for the purpose of enforcing satisfaction of that judgment. It is not necessary to determine whether such a creditor is bound, at all events, to use legal diligence to give effect to the judgment, or whether he may remain passive until required by the assignor to resort to legal diligence. Here the creditor, by suing out execution, assumed, as it were, the possession or control of this judgment in exclusion of the assignor, and is within the principle which charges the creditor in possession of property held by him as a security, not only with what he actually receives, but with what he might have received but for his wilful default or neglect. I think it would be difficult to find a principle for charging such a creditor simply upon the ground that he gave time to the debtor upon the judgment; for it may be that the giving of time is a

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provident act, and affords the best chance of recovering the debt. In referring it to the master to take an account of what the defendant has received, or might have received without his wilful default or neglect, in respect of the judgment debt assigned to him, I am, in truth, following the authority of *ex parte Mure*, without thinking it necessary, for the purposes of this case, to adopt all the principles which are there stated.[1]

## \*NUNN v. BARLOW.

[\*588]

1824 30th January.—*Creditor.*—*Right of retainer.*

The personal representative may retain for his own debt, notwithstanding a decree has been made in a suit by the other creditors for the administration of the assets, and notwithstanding the assets out of which he seeks to retain his debt came to his hands after the decree.

THIS was a creditor's suit. Administration to the deceased, with the will annexed, had been granted to the defendant Barlow during the minority of the defendant Weatherall, the son and heir of the deceased. In August 1810, the usual decree was made. About the end of that year or the commencement of the next Weatherall came of age, and consequently the administration granted to Barlow ceased; but, in May 1811, another administration was granted to him as Weatherall's attorney; and he was also appointed receiver of the testator's real estates. In March 1818 he died, and administration *de bonis non* was granted to Weatherall, and he was afterwards appointed receiver of the real estates.

Weatherall having received moneys on account of the personal estate as administrator which he had not accounted for, the plaintiffs, in March 1822, obtained an order that he should account before the master for all such sums as he had then or thereafter might receive as the personal representative of his late father when he passed his accounts before the master as receiver of the rents and profits of the real estates; and the master was required to include the sum due in respect of the personal estate in his report of rents and profits.

In Barlow's lifetime Weatherall had proved a debt, under the decree against his father's estate. The master had reported him a creditor for part of the sum proved, and he was afterwards paid part of that sum.

\*Upon a motion being made for the plaintiffs that Weatherall [\*589] might be ordered to pay into court the whole of the balance reported due from him in respect of his father's personal estate under the order of March, 1822, he claimed to retain the balance of the sum which the master had reported due to him.

Mr. Tinsley, in support of the motion, said that there could be no right of retainer in respect of assets possessed after a decree against the personal

[1] Vide *Saunders v. Marshall*, 4 Hen. & Mun. 455. *Copel v. Butler*, 2 Sim. & Sta. 457.

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representative for an account; that the decree was in the nature of a judgment for all creditors; that no creditor could sustain an action after a decree; that the retainer by the personal representative stood in the place of the creditor's action; and that, as there could be no action, so there could be no retainer.

Mr. *Flather*, for the defendant *Weatherall*, cited 3 Black. Com. 18; *Franks v. Cooper*, (a) and *Robinson v. Cumming*, (b) and said that an objection to the right of retainer in that case would have lain, but that it was not taken, and that, in this case the right of retainer vested in *Weatherall* previous to the decree; and that the decree could not alter the situation of the parties.

Mr. *Tinney* in reply, distinguished *Robinson v. Cumming* from the present case, saying that the executor in that case seemed to have retained part only of his debt, and that the question was whether he was entitled to retain partiality.

The VICE-CHANCELLOR:—The decree for an account does not [\*590] affect the legal priorities of creditors; and there is no distinction in this respect between assets possessed prior to the decree and subsequent to the decree. I cannot, therefore, find a principle why it should affect the legal right of the personal representative to retain out of future assets; and I have never heard of any authority to that effect. Order the defendant to pay into court the balance of the sum reported due from him, after deducting the remainder of his debt.[1]

### DLORET v. ROTHSCHILD.

1824, 4th February.—*Specific performance.*

A bill will lie for the specific performance of a contract for the purchase of government stock, where it prays for the delivery of certificates which give the legal title to the stock.

Time is of the essence of a contract, where the subject of the contract is of such a nature as to be exposed to a daily variation in its value.

In the month of September, 1823, the defendant contracted to grant a loan to the Neapolitan government, in consideration of a certain annual sum to be paid by that government, called Neapolitan rentes, or Neapolitan stock. This stock was brought by the defendant into the market, in the manner usual in cases of public loans; and the mode in which he disposed of it was by selling scrip receipts, which were issued to the purchasers on their paying ten per cent on the amount

(a) 4 Ves. 763.

(b) 2 Atk. 411.

[1] The usual direction contained in decrees, for the distribution of the personal estate of a deceased debtor, among his creditors, to pay the debts in a due course of administration and without preference, is not a direction to disregard legal priorities; but is a direction to pay those debts, which are entitled to be first paid, according to their legal priorities, but rateably and without preference as to debts of the same class, where no legal priority exists. *Ainslie v. Radcliff and others*, 7 Paige, 439.

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of the stock. In these scrip receipts it was expressed that, on payment of the balance on or before the 1st of February, 1823, with four per cent interest thereon from the 15th October, 1822, the bearer would be entitled for that amount of stock, with interest from the 1st July, 1822.

These scrip receipts were currently sold in the money market, in the months of December, 1822, and January, 1823, and during that period the plaintiff purchased sixteen such receipts, which would \*altogether [\*591] have entitled him to certificates for 12,500 Neapolitan rentes.

On the 24th January, 1823, the defendant caused an advertisement, relative to the stock, to be published in the Morning Chronicle newspaper, which was thus expressed: "At the request of several of the holders of the Neapolitan scrip receipts, a fresh extension for the payment of the balances will be granted by N. M. Rothschild, as follows: viz. five per cent to be paid on the 1st February next, with interest due on the receipts up to that day." The advertisement then stated at length that the remainder of the balances were to be paid in such instalments one every month; the last to be paid on the 15th August, 1823, with interest at four per cent from the 1st February on each instalment as it became due; and it then proceeded in these words: "The parties who intend availing themselves of this arrangement in preference to the terms proposed in the advertisement of the 11th instant, are required to state their intention at the time of leaving their receipts at Mr. Rothschild's counting-house; as, in the event of their not doing so, they will be considered as acceding to the terms contained in Mr. Rothschild's former advertisement."

On the 5th February, 1823, the defendant caused the following advertisement to be published in the same newspaper.

"Neapolitan loan of 1822. Many of the holders of the Neapolitan deposit receipts having failed to comply with the tenor of those engagements by which the parties were required to pay the balances thereof on the first February, 1823, with the interest accruing \*up to that day, and not having [\*592] availed themselves of the terms proposed for their accommodation in the advertisements of the 11th and 23d January last, public notice is given by N. M. Rothschild that such receipts are void, that the deposit money is forfeited, and that all obligation has ceased on his part to deliver certificates at a future period. Being desirous, however, that no individual should suffer unknowingly on this occasion, Mr. Rothschild hereby notifies that he will grant to the holders of his receipts the indulgence of one week from this date, either to pay the balances due by them on the 1st instant, or to make the further deposit called for by the advertisements of the 11th and 22d January last. 5th February, 1823."

On the 12th February, 1823, the defendant caused to be published in the same newspaper another advertisement, as follows; "Neapolitan loan of

1824.—*Doloret v. Rothschild.*

1822. Referring to the several advertisements of the 11th and 23d January last, and 5th February instant, which have appeared in the public papers, giving an extension of time for payment of the balances due upon such receipts for the Neapolitan loan, N. M. Rothschild informs the holders of the scrip receipts, that the loan contracted for has been paid, and the stock certificates are ready for delivery, and he begs that those who have not accepted the terms of extension of payment will take notice that, unless the terms are accepted, or the balances and interest thereon paid, on or before the 20th day of February instant, he will consider that such holders of scrip receipts do not intend to complete their contracts, and will not hereafter claim the certificates. N. M. Rothschild will, therefore, after the 20th February instant, dispose of or keep the certificates and put the proceeds or value of [\*503] them to the credit of \*the holders, on account of the balances and interest due, and hold them accountable to him for any loss or deficiency. 11th February 1823."

In the interval between these advertisements and up to the 20th of February 1823, as well as subsequently to that day, scrip receipts of the Neapolitan Loan continued to be publicly bought and sold in the London market, with the knowledge of the defendant. On the 12th of June 1823, the plaintiff (who had previously told the defendant of his having purchased the sixteen scrip receipts,) applied to the defendant and offered to pay all the instalments then due on the receipts, none of which had been paid except the original deposit. The defendant having refused to allow the plaintiff to do this, which would have entitled him to the certificates as if the instalments had been regularly paid pursuant to the tenor of the receipts or of the advertisements, the present bill was filed.

The bill, after stating the various facts already mentioned, charged that time was not, in equity, of the essence of the contract contained in the scrip receipts, and was not so considered by the defendant, as appeared from the advertisements; or that, if time ever was of the essence of the contract, the same had been abandoned and waived by the acts and conduct of the defendant.

The prayer of the bill was, that an account might be taken of principal money and interest due to the defendant for the instalments on the scrip receipts, and that, on payment of the amount found due in respect of such instalments, the defendant might be decreed to deliver the certificates on the sixteen [\*594] scrip receipts, \*so as that the plaintiff might have the benefit of them and of the 12,500 Neapolitan rentes: that an account might be taken of the amount of income received by the defendant on the 12,500 Neapolitan rentes: that the plaintiff might have credit in account with the defendant for the amount so received; and that the defendant might be decreed to make compensation if through any fall in the price of the stock the certificates, when delivered to the plaintiff, should be of less value than in June 1823; or,

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if the defendant had disposed of the certificates and should be unable to deliver them, then that he might be decreed to make full compensation to the plaintiff: or, if the court should think that the plaintiff was not entitled to any part of the relief before prayed for, that the defendant might be decreed to pay back to him the amount of the original deposit; and that the defendant might be restrained from parting with the certificates.

To this bill the defendant put in a general demurrer for want of equity.

*Mr. Pemberton* for the demurrer:—

I. The subject matter of the contract in this case is such that the court will not decree a specific performance, but will leave the party to seek a remedy at law if he has any. *Cud v. Rutter*,<sup>(a)</sup> and *Nutbourn v. Thornton*,<sup>(b)</sup> have established the principle that the court will not compel the specific performance of an agreement for the transfer of stock.[1] The same principle applies to the present case, which does not differ from the others on this point, except in the circumstance that the subject of the contract here is foreign stock. \*Neapolitan stock being daily in the market here is as much [\*595] within the general doctrine of the courts, as to the specific performance of agreements for the purchase of chattels as British stock; and it is as clear that a court of equity will not entertain a bill for the performance of a contract for the sale of it, as that it would not entertain a bill for the performance of a contract to sell a certain number of casks of tallow on a certain day.

II. It is decided that, in cases as to the specific performance of agreements, there must be a mutuality of remedy between the parties. Here there is no mutuality. There is no contract entered into with the defendant by the plaintiff, or any individual holder of scrip receipts to pay the price. It is quite clear that he could not come into this court to compel them to pay. He has only given to the holders of these receipts, on their doing certain acts, a right to certificates for Neapolitan stock. The holders have contracted to do nothing which he can by a decree of any court specifically compel them to do. The only hold he has upon them is by the deposit of ten per cent.

III. Time is in this case of the essence of the contract. The question is, whether a party who purchases the right to receive a certain quantity of stock on payment of money on a certain day, after allowing the day fixed upon to pass without paying the money, can, when he finds a rise in the price of the stock, acquire a right to it by paying the money at a period long after that fixed upon for the payment. In this case there is a lapse, not of some days, but of many months. On the 1st of February 1823 Neapolitan \*stock may have been at a discount, so as to make the holders of scrip [\*596] receipts prefer forfeiting their deposit of ten per cent. But if, after

(a) 1 P. W. 570, and 5 Vin. Abr. 538.

(b) *Ante*, 174.

[1] *Vide Butler v. O'Kear*, 1 Desau. 332.



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allowing the time of payment to elapse for any such reason, the stock from intervening political events should happen to have risen, this court would hardly be disposed to assist a person who allowed the time of payment to elapse, to come forward long afterwards, and claim the same benefit to which he would have been entitled if he had paid his money in due time. It seems quite manifest that this is precisely one of those cases in which the court holds time to be of the essence of the contract. There are no exact authorities on this subject, because the decisions which have established that the court will not entertain a suit for the performance of a contract of this kind, proceed on this wise principle, that, before performance of the contract can be decreed, the lapse of time may have altered the value of the subject of the contract. *Seton v. Slade*, (c) *Withy v. Cottle*, (d) The principle on which *Sparks v. Liverpool Water Works Company* (e) was decided, is exactly applicable to this case. It is impossible to imagine any property as to which time is more essentially of the essence of the contract than stock in public funds, on account of the fluctuation in its value.

Mr. *Sugden* and Mr. *Knight*, for the plaintiff:—The two principles contended for in support of the demurrer are neither of them involved in the decision of the present case.

I. The general rule that the court will not decree specific performance of an agreement for the transfer of stock, must be admitted; [\*597] and it proceeds on the general principle that any one 1,000*l.* of stock is exactly similar to another 1,000*l.* of the same stock. The case of *Cud v. Rutter*, quoted on the other side, in which this rule was established, is much better reported in 5 *Viner's Abridgment*, 538, than in *Peere William's reports*; and it is remarkable that, in that case, where the bill prayed for the specific performance of an agreement for the transfer of stock, Lord Chancellor Parker did not dismiss the bill. The reason that an action at law is a sufficient remedy, does not apply to the present case, where the plaintiff is prevented from obtaining relief at law, not by any conduct of his own, but by the conduct of *Rothschild*. It is perfectly settled that it is no answer to a bill for specific performance to say that the plaintiff can recover no damages at law. *Thompson v. Hurcourt*, (f) But what distinguishes this case from those in which it has been held that the court will not perform an agreement to transfer stock is, that this bill does not pray for the transfer of stock. It prays that the defendant may deliver to the plaintiff certain certificates charged to be in his custody. It seeks for the delivery of documents by which the plaintiff can establish his title to the stock.

II. As to time being of the essence of the contract, admitting all that has been urged on that point, what relieves the case of the plaintiff from any application of that principle, is the charge in the bill that, if time was originally

(c) 7 *Ves.* 265.(d) 1 *Turner's Rep.* 78.(e) 13 *Ves.* 428.(f) *Bro. P. C.* 193.

1824.—*Deloret v. Rothschild.*

of the essence of the contract, it has been waived and abandoned by the acts of the defendant. The various advertisements published by the \*defendant, and particularly that of the 12th of February 1823, are ex- [\*598] press abandonments of the time fixed by the original agreement expressed in the scrip receipts; for, in the latter advertisement, he expresses that, if the payments are not made in the manner therein mentioned, he will dispose of the certificates and consider the holders of the receipts liable for any loss, and put the proceeds to their credit. How is that proceeding consistent with the argument that time is of the essence of the contract?

Mr. *Pemberton*, in reply, insisted that time was of the essence of the contract, and cited *Hagedon v. Laing*.(g)

The VICE CHANCELLOR :—I am of opinion that, inasmuch as this bill prays a delivery of the certificates which would constitute the plaintiff the proprietor of a certain quantity of stock, the bill in equity will hold; because a court of law could not give the property, but could only give a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party.[1] I consider also that the plaintiff not being the original holder of the scrip but merely the bearer, may not be able to maintain any action at law upon the contract, and that, if he has any title, it must be in equity.

Where a court of equity holds that time is not of the essence of a contract, it proceeds upon the principle that, having regard to the nature of the subject, time is immaterial to the value, and is urged only by way of pretence and evasion.[2] But that principle can \*have no application to a case [\*599] like the present, where from the nature of the subject the value is exposed to daily variation, and a contract which was disadvantageous to the plaintiff on the 1st February, and would therefore be then declined by him, might be highly advantageous to him on the 2d February. It is true, as stated in the bill, that the time mentioned in the scrip receipts has been waived and abandoned by the advertisement of the defendant: but that waiver was upon the condition that the holders of the receipts made their payments at the extended times stated in the advertisements, which it is admitted has not been done by the plaintiff. The claim of the plaintiff to have the original deposit of ten per cent returned to him, as being retained by the defendant without

(g) 1 Marsh. 514.

[1] Vide *Wilkey v. Cottle*, ante, 174; *Adderley v. Dixon*, post, 607.

[2] Parties may by their agreement make time, of the essence of the contract. *Wells v. Smith*, 2 Edw. 78. *More v. Smedburgh*, 8 Paige, 601; *Benedict v. Lynch*, 1 Johns. Ch. Rep. 370; *Hatch v. Cobb*, 4 Johns. Ch. Rep. 559; *Colcock v. Butler*, 1 Deau. 307. Where the agreement between vendor and purchaser was, that it should be void if the purchaser's counsel should be of opinion that a marketable title could not be made by a certain time; and the counsel being of that opinion, a bill by the purchaser for a specific performance was dismissed with costs. *Williams v. Edwards*, 2 Sim. 78.

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consideration, cannot be maintained,[1] because the plaintiff had full consideration for that deposit in the option which the scrip receipts gave him to become the proprietor of so much stock, by payment of the balance of the stipulated price on the day named; and it is not the less a consideration because the plaintiff did not think fit to avail himself of the option.

Demurrer allowed.

[\*600]

\*LINGEN v. SIMPSON.

1824, 11th February.—*Partners.—Specific performance.*

If, upon a dissolution of partnership, it is agreed that certain articles of the partnership stock shall become the exclusive property of one of the partners, and that a certain fund shall be appropriated to the payment of the debts, and that fund afterwards proves insufficient for the purpose, the other partner has no lien on those articles in respect of such deficiency.

A court of equity will enforce an agreement made upon a dissolution of partnership, that a particular book used in the trade should become the exclusive property of one of the partners, and that a copy of it should be delivered to the other.

In 1815, the defendant and one Ellis entered into partnership together in the trade of a coach-founder and plater. The business consisted in the making of metal ornaments for carriages, and other articles. The partners, in order to enable the tradesmen whom they supplied with these articles, to give them orders in the most convenient manner, furnished them with books containing plates of the articles, and kept themselves two books, called No. 1 and No. 2, containing similar plates. Every plate in the books delivered to the tradesmen was numbered; and the corresponding plate in the books kept by the partners had the same number annexed to it: so that when the tradesmen sent orders for any of the articles, instead of giving a description of them, they denoted them by the numbers annexed to those articles in their books, and the manufacturers, by referring to the books No. 1 and No. 2, immediately ascertained which of the articles the tradesmen wanted. In March 1820, the defendant and Ellis dissolved partnership. Upon the dissolution they agreed that the stock in trade should be equally divided between them: that the debts due to the partnership should be applied in payment of the debts due from it: that Ellis should have the book called No. 1, and the defendant that called No. 2; and that each of them should have a copy of the other's book, and have the use of the original until the copy was made. The stock in trade was accordingly divided between them: the books No. 1 and No. 2 were placed

[\*601] \*in the hands of a third person in order that the copies might be made; and each of the parties began to carry on the business separately. Shortly afterwards Ellis formed a partnership with one Smith, which continued a few months only. He then entered into partnership with the plain-

[1] Vide *Kendall v. Beckett*, 2 Russ. & Mylne, 88.

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tiff; and soon afterwards a separate commission of bankrupt issued against him. The plaintiff purchased of the assignees all Ellis's share and interest in the partnership property, stock and effects. After this the defendant sent a message to the plaintiff, saying that he wanted No. 2, (the copy of which was not then completed) for the purpose of making an article by it; and it was accordingly delivered to the defendant for that purpose; but upon the plaintiff applying to have it returned, the defendant refused to deliver it up, alleging as a reason for his so doing, that the debts due to the first partnership were inadequate to pay those that were due from it, and that Ellis's estate was liable to make up one moiety of the deficiency. Under these circumstances the bill was filed to enforce the plaintiff's right to have a copy of No. 2 made and delivered to him.

Mr. *Hart* and Mr. *Farrer* for the plaintiff:—It was impossible for the plaintiff to adopt any other course than that of applying to a court of equity for the relief he seeks, for no action at law could have been brought in this case. The defendant now resists part only of the original agreement. That agreement has been fully performed in every respect, except as to the making of this copy. It will be said for the defendant that he has a right to retain this book because the debts of the partnership are not paid. We admit that one partner cannot discharge the lien which the creditors have on the partnership property, but he \*may give to his co-partner a separate interest in all or in any [\*602] part of the partnership property. This is a question, not between the partners and the creditors, but between one of the partners and a person claiming under the other. This lien is not set up by the creditors, but by one of the partners for his own benefit. He cannot have any claim upon this book, except what he is entitled to under his agreement with Ellis; and the setting up of this lien is in direct breach of that agreement.

Mr. *Horne* and Mr. *Cooper* for the defendant, insisted, first, that a court of equity could not interfere in this case; secondly, that, if it could interfere, the plaintiff could only stand in the place of Ellis, and that Ellis, upon the whole, was a debtor to the defendant upon the partnership accounts, and could only have the relief he prayed upon the terms of paying what was so due to the defendant; and thirdly, that the plaintiff had not established his title to stand in Ellis's place.

The VICE-CHANCELLOR:—It is established by the evidence of Ellis, who is a good witness against his own estate, that his right in the reference-books became a part of the co-partnership estate of himself and the plaintiff, and, consequently, well passed to the plaintiff by the purchase from the assignees of Ellis's share and interest in the co-partnership estate, stock and effects.

I fully accede to the proposition that the plaintiff can stand, as against the defendant, in no better situation than Ellis himself would have stood if he had not parted with his interest in the subject of the suit; and, \*if [\*603] these reference-books remained partnership property, it would be unquestionable that the plaintiff could not be entitled to relief without a general

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arrangement of the partnership concerns ; for, until such general arrangement, no partner can claim an exclusive right in any article of the partnership property. But upon a dissolution any part of the partnership property may, by contract of the partners, be converted into the separate, individual property of either ; and it is clear here that, upon the dissolution between the defendant and Ellis, the reference-book No. 1 became the separate property of Ellis, and the reference-book No. 2 became the separate property of the defendant, subject to the delivery of the copy to Ellis and the interim inspection in the mean time ; and the claim of the plaintiff by this bill does not, therefore, refer to any article of partnership property.

It is argued that a court of equity will not interfere in such a matter. The principle upon which a court of equity interferes to enforce contracts is, that the particular relief prayed cannot be had in a court of law ; and a court of law has no means of compelling this defendant to permit the copy of No 2 to be completed, or to permit the interim inspection of the book by the plaintiff.[1] Decree therefore according to the prayer of the bill, with costs.

[\*604]

\**RACKSTRAW v. VILE*.1823, 15th December. 1824, 20th February.—*Will*.

Testator gave his son an absolute interest in one-fourth of his personal estate ; but, by a codicil he directed that his son's share should be only for the life of himself and his wife, provided they, had no issue ; and that, at their death, it should fall into the residue. Held, that the son did not take absolutely, but subject to an executory bequest over, in case there was no issue of himself and his wife living at the death of the survivor.

JOHN SMITH in his will, after making a provision for his wife, expressed himself as follows:

“ I give unto my son William John Smith all my right, title and interest in one moiety of the house and premises, No 78, Blackman-Street, Southwark ; this I value at 500*l* ; and, as he has received of me in cash 500*l*. I request that 1,000*l*. be deducted from his fourth equal share of my whole property intended to be divided between my four children ; that is to say, all my real and personal estate, of whatever nature or description, which I may die possessed of, together with the rest and residue of that which I have herein given to my wife, at her decease, shall be equally divided, share and share alike, between my son as aforesaid, subject to the deduction above-stated, to my daughter Mary Ann Blunt, my daughter Elizabeth Margaret Smith, and my daughter Sarah Smith, and their respective heirs, but not to be subject to the debts or control of the husband of my daughter Mary Ann Blunt, or of the

[1] Vide *Deloret v. Rothschild*, ante, 590.

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husband which either of them may marry. My daughter Mary Ann having received 500*l.* at her marriage with Robert Blunt, I request that sum to be deducted from her fourth part also; and, should either or both of my other daughters receive their marriage portions before my decease, the deductions are to be made in like manner, to the intent that each one shall have an equal share; and, in case of the demise of either of my children before they arrive at the age of twenty-one years, the deceased's \*share shall fall [\*605] into and become a part of the rest and residue, for the benefit of the survivors, their heirs and executors."

The testator afterwards made the following codicils to his will:

"By way of codicil to my will: I hereby request that the equal share of my estate which may fall to my son William John Smith, may be only for the term of his own and his wife's natural lives, provided there is no issue but, that at their decease, it shall become a part of and fall into the rest and residue."

"By way of second codicil to my will: I hereby request that the portion or share of whatever property I may die possessed of, which I have bequeathed to my son William John Smith, shall be only for the natural life of himself and his wife, provided they have no issue; and, at their death, it shall become a part of the rest and residue."

Both these codicils were unattested.

The bill was filed by Samuel Sambrook Rackstraw and Elizabeth Margaret his wife, (one of the testator's daughters,) and Sarah Smith, another of the testator's daughters, against the executor, the widow, Mr. and Mrs. Blunt, and William John Smith. It charged that, if William John Smith died without leaving issue by his wife him surviving, his interest in the testator's personal estate would become vested in Elizabeth Margaret Rackstraw, Sarah Smith, and Mary Ann Blunt. It prayed that an account might be taken of the testator's personal estate possessed by his \*executor; that it might [\*606] be applied in a due course of administration; and that one fourth part of the clear surplus, less the sum of 1,000*l.* might be laid out and invested at interest for the benefit of William John Smith during the life of himself and his wife, and, in case they should leave no issue them surviving, for the benefit of Elizabeth Margaret Rackstraw, Sarah Smith, and Mary Ann Blunt, in equal shares and proportions.

William John Smith, by his answer, insisted that his share of the testator's estate ought to be paid to him for his own absolute use and benefit.

Mr. *Heald* and Mr. *Bickersteth*, for the plaintiffs, contended that William John Smith did not take an absolute interest in the one fourth of the testator's estate which was bequeathed to him; but that, under the codicils, it would go over to his sisters in case there was no issue of himself and his wife living at the decease of the survivor of them.

Mr. *Sudgen* and Mr. *Moore*, for the defendant William John Smith, said

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that, as a devise to a person, and, provided he had no issue, then over to another, would give the first taker an estate tail in lands, so it would give the absolute interest in personal estate; and that the failure of issue was to be considered as a general failure of issue, and could not be confined to the death of the survivor of the husband and wife, unless words could be found either in the will or codicils, which expressly limited it to that event.

The VICE-CHANCELLOR:—This codicil, being unattested, speaks only [\*607] as to personal estate. The will and codicil, taken together, \*give the personal estate, in the first instance, absolutely to the son W. J. Smith, with a good limitation over, by way of executory devise, at the death of the survivor of himself and his wife, if there be no issue then living. The failure of issue is plainly confined to the death of the survivor, by the direction that the share of W. J. Smith is to become a part of the rest and residue at their death.[1]

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#### ADDERLEY v. DIXON.

1823, 8th December; 1824, 23d February.—*Specific performance.*

Specific performance decree, at the suit of the vendor, of a contract for the sale of debts proved under a commission of bankrupt.

THE plaintiffs having purchased and taken assignments of certain debts which had been proved under two commissions of bankrupt, agreed to sell them to the defendant for 2s. 6d. in the pound.

The defendant's solicitor, accordingly, gave notice of the sale to the assignees, and prepared an assignment of the debts, and the plaintiffs, notwithstanding the purchase money had not been paid, executed it, and signed the receipt for the consideration money, and left it in the solicitor's hands. The bill was filed to compel the defendant specifically to perform the agreement, and to pay the purchase money to the plaintiffs.

The defendant, by his answer, submitted that the matter of the agreement was not the proper subject of a bill in equity for a specific performance; and claimed the same benefit as if he had demurred to the bill.

Mr. *Sugden* and Mr. *Garratt* for the plaintiffs:—It is not stated in the bill whether this agreement was in writing or not. But that is not material, as it \*has been decided that an agreement for the sale of a debt is not within the statute of frauds. *Anstey v. Marden*.(a)

(a) 1 New Rep. 124.

[1] A gift over of money upon the death of a legatee without issue is void, unless from the words of the will it can be collected that the testator meant a death without issue at the time of the death of the legatee. *Lepine v. Ferard*, 2 Russ. & Mylne, 378.

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With respect to the question, whether this court has jurisdiction to decree a specific performance of an agreement for the sale of a debt, the case of *Wright v. Bell*(b) contains the judgment of the late chief baron upon the very point. That case was discussed before your honor in *Withy v. Cottle*,(c) and your honor there decreed a specific performance of an agreement for the purchase of an annuity payable out of the dividends of stock. It is settled that a person who wants a specific chattel may come into this court to have it delivered to him, as in the case of the Pusey horn,(d) and the tobacco-box.(e) If then the purchaser in this case might have filed a bill for a specific performance of the agreement, the vendors must have the same privilege; for the remedy must be mutual. The reason why the court refuses to decree a specific performance of a contract for a transfer of stock, is that one sum of stock is the same as another. Here the plaintiffs cannot get what they have contracted for, except by the aid of this court. They want not the money of any particular person, but the sum for which they have agreed to sell these debts. If they went to law they might get more or less; but they have a right to have the very sum of money. Independently of this, the plaintiffs are entitled to the benefit of the defendant's oath, and to call upon him to say whether there was or was not such a contract as is stated in \*the bill, [\*609] and also to have a lien on the subject which they have contracted to sell. *Lewis v. Lord Lechmere*.(f) We submit, therefore, that, both upon principle and authority, the plaintiffs are entitled to the relief prayed by this bill.

*Mr. Hart and Mr. Treslove* for the defendant:—As the assignment of these debts has been executed and delivered to the defendant's solicitor, nothing remains to be done but the payment of the money. If the court, therefore, were to make a decree in this case it would, in effect, be nothing more than a verdict in an action of assumpsit for the amount of the purchase money. A court of equity lends its aid to the execution of executory agreements only. Here the plaintiff's demand is a mere legal debt.

It is not clear that in the converse of this case relief would have been given in this court. Suppose the defendant had filed a bill for a specific performance of this agreement, would it not have been said that this court gives relief only where the specific thing is wanted and damages are not a sufficient compensation? *Buxton v. Lister*,(g) *Dorison v. Westbrook*.(h)

The case of *Wright v. Bell* differs from this case; for there the defendant waived all objections except as to the title, and the lord chief baron notices that circumstance in his judgment. This is not the case here; for this defendant insists upon the want of jurisdiction in this court to decree a specific performance in the present case.

(b) Dan. 95.

(c) Ante, 174.

(d) *Pusey v. Pusey*, 1 Vern. 273.

(e) *Fells v. Read*, 3 Ves. 70. See also *Duke of Somerset v. Cookson*, 3 P. W. 330.

(f) 10 Mod. 503, 506.

(g) 3 Atk. 383.

(h) 5 Vin. Ab. 548, pl. 22.



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[\*610] \*Mr. Sugden in reply said, that whether the court could or could not decree a specific performance of the agreement must depend upon the nature of it, and not upon the proceedings which had been taken towards its completion; and that, if the plaintiffs were entitled to that relief upon general principles, it would be hard to deprive them of it because they had performed their part of the contract.

The VICE-CHANCELLOR:—Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus a court of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money-value of the land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a court of equity will not, generally, decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market-price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for; inasmuch as, with the damages, he may purchase the same quantity of the like stock or goods.

In *Taylor v. Neville*, cited in *Buxton v. Lister*, specific performance was decreed of a contract for the sale of 800 tons of iron, to be delivered and paid for in a certain number of years and by instalments; and the reason given by Lord Hardwicke, is that such sort of contracts differ from those [\*611] that are immediately to be executed. \*And they do differ in this respect, that the profit upon the contract being to depend upon future events, cannot be correctly estimated in damages where the calculation must proceed upon conjecture. In such a case to compel a party to accept damages for the non-performance of his contract, is to compel him to sell the actual profit which may arise from it, at a conjectural price. In *Ball v. Coggs*(i) specific performance was decreed in the house of lords of a contract to pay the plaintiff a certain annual sum for his life, and also a certain other sum for every hundred weight of brass wire manufactured by the defendant during the life of the plaintiff. The same principle is to be applied to this case. Damages might be no complete remedy, being to be calculated merely by conjecture; and to compel the plaintiff in such a case to take damages would be to compel him to sell the annual provision during his life for which he had contracted, at a conjectural price. In *Buxton v. Lister*, Lord Hardwicke puts the case of a ship carpenter purchasing timber which was peculiarly convenient to him by reason of its vicinity; and also the case of an owner of land covered with timber contracting to sell his timber in order to clear his land; and assumes that as, in both those cases, damages would not, by reason of the special circumstances be a complete remedy, equity would decree a specific performance.

(i) 1 Bro. P. C. 140.

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The present case being a contract for the sale of the uncertain dividends which may become payable from the estates of the two bankrupts, it appears to me that, upon the principle established by the cases of *Ball v. Coggs*, and *Taylor v. Neville*, a court of equity \*will decree specific performance, because damages at law cannot accurately represent the value of the future dividends; and to compel this purchaser to take such damages would be to compel him to sell these dividends at a conjectural price.

It is true that the present bill is not filed by the purchaser, but by the vendor, who seeks, not the uncertain dividends, but the certain sum to be paid for them. It has, however, been settled, by repeated decisions that the remedy, in equity must be mutual; and that, where a bill will lie for the purchaser, it will also lie for the vendor.[1]

CORBET V. CORBET.

1824, 23d and 24th February.—*Dower.—Jointure.*

Widow held to be barred of her dower in equity by a rent-charge granted in trust for her by way of jointure by the marriage settlement, to which her father was a party, although she was an infant at the time of the marriage, and the rent-charge failed by defect of title in the husband, and was afterwards confirmed by deed and recovery during the coverture; which, though they proved a valid confirmation, might have been defeated if there had been a son of the marriage.

Wife evicted of jointure is by stat. 27 Hen. VIII, c. 10, s. 7, entitled to dower only *pro tanto*.

Grant of a rent-charge out of particular lands to an infant, in consideration of marriage, for her jointure, though the grantor be afterwards evicted, being in equity a general agreement to grant a rent-charge of that amount out of some lands, will bind the infant if her parent or guardian assented to it.

THIS was a bill by a widow, claiming dower out of the estates of which her husband was seised.

At the time of the marriage between the plaintiff and Edward Corbet, her late husband, he was, under a settlement made in the year 1758, entitled, as tenant for life in possession, to certain freehold estates in the county of Merioneth, with remainder to his first and other sons in tail, with remainders over, with power to grant to the use of any wife he should marry, as a jointure, such part of the estates comprised in the settlement as he should think fit, so as such jointure should not exceed the sum of 10*l.* yearly for every 100*l.* which \*he should receive as a fortune with such wife; and so as the fortune [\*613] of such wife should be settled upon the children of the marriage; and if no child or children, so as her fortune should be applied in discharge of incumbrances upon the estates.

The plaintiff, at the time of her marriage, was an infant of the age of nineteen, and had no fortune.

[1] Vide *Withy v. Cottle*, ante, 174. *Hamblin v. Dinneford*, 2 Edw. 531.

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By an indenture, dated the 4th of September 1813, executed previously to and in contemplation of the marriage, and made between Edward Corbet of the first part, the plaintiff and her father of the second part, and two trustees of the third part, Edward Corbet, in consideration of the marriage, granted and confirmed to the trustees, their executors, administrators and assigns, a yearly rent-charge of 100*l.* for the natural life of the plaintiff, in case she survived him, to be issuing out of the estates and hereditaments after mentioned, with powers of entry and distress, and for better securing the payment of the rent charge, and by virtue of the power contained in the settlement of 1758, Edward Corbet demised to the trustees, their executors, administrators and assigns, part of the estates comprised in the settlement of 1758, for the term of 99 years if the plaintiff should so long live, without impeachment of waste upon trust to secure the rent-charge of 100*l.*; and, in case of his decease leaving the plaintiff surviving him, to pay it to the plaintiff for her life; and it was thereby agreed between all parties that the rent-charge and the other provisions thereby made for the plaintiff should be in full for her jointure and in bar of her dower.

[\*614] \*The marriage took place soon after the date of this deed. It was afterwards discovered that, as the plaintiff had no fortune, the rent-charge could not be granted under the power in the settlement of 1758. There was issue of the marriage only one daughter. Edward Corbet, upon discovering the defect in the grant of the rent-charge, applied to the next tenant in tail in remainder expectant on his own death without issue to confirm the rent-charge. The next tenant in tail accordingly agreed to confirm it; and a recovery of the estates was suffered in 1819, the uses of which were, by an indenture duly executed, and to which the plaintiff was named as a party, declared to secure the rent-charge of 100*l.* to the plaintiff for her jointure.

Edward Corbet being also seised in fee of other estates devised them to various persons, who were defendants to this bill.

Edward Corbet died in 1820, leaving issue only one daughter, an infant.

The bill waived the jointure of 100*l.* a year, and charged that the settlement of 1813 was fraudulent and delusive; and that the recovery and the deed declaring the uses of it were executed without her knowledge, without her being consulted upon the subject, and during her coverture.

The defendants, by their answer, insisted that the rent-charge of 100*l.* to the plaintiff was a bar to her dower.

[\*615] \*The cause now came on to be heard.

Mr. *Sugden* and Mr. *J. Martin*, for the plaintiff:—The instrument by which the jointure was created in this case is a mere nullity. It professes to be granted pursuant to a power, according to the terms of which it could not be a valid jointure to the plaintiff, because she had no fortune. It is now perfectly established that an infant cannot be barred of her dower, unless the

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provision in lieu of dower is as certain as the dower itself. *Drury v. Drury*, (a) *Carruthers v. Carruthers*. (b) In the latter case it was held that the wife was not bound by the jointure, because it might have happened according to the limitations, that it could not come into possession immediately on the death of the husband. It is indeed mentioned by Lord Eldon, in *Milner v. Lord Harewood*, (c) that Lord Thurlow agreed with Lord Northington in thinking a female infant could not be bound by a settlement. But that fact is now mere matter of curiosity; because, since the decision in *Drury v. Drury* by the house of lords, the law must be considered as settled, that the infant may be bound if the jointure be certain and proper in all respects. In *Carruthers v. Carruthers*, (d) the master of the rolls discusses the very question that arises in this case, for he says: "It is said that guardians have a power to bind the right of the infant; but I think *Drury v. Drury* did not mean to decide that, if the provision had not been certain, or if she was only to take upon a remote contingency. Before I perform an \*agreement, I must see that [\*616] it is reasonable." And a little afterwards he says what is exactly applicable to this case: "suppose she had had a jointure which turned out to be bad, I mean which would not have afforded her the same advantage which she would have had from her dower, would that have bound her. If it is good at all it must be from the making of the settlement." The very same doctrine was acted upon in *Smith v. Smith*. (e) *Cary v. Wilks* (f) goes much farther; but it must be admitted that, since *Drury v. Drury*, the extent of the doctrine laid down there has been qualified. Here the husband had no right to grant the rent-charge; he was mere tenant for life; and the settlement refers to a power of which it cannot be a valid execution. The question then is, whether the subsequent deed of 1819 was a confirmation of the deed of 1813, so as to make a valid jointure in bar of dower? Lord Alvanley says that, if a jointure be good at all, it must be good from the date of it. The stat. 27 Hen. VIII. of uses, on which the doctrine of dower rests, provides that, where any provision is made for a woman by jointure after marriage, the wife has her election. It is impossible to put this case higher than a case of jointure after marriage. The plaintiff has therefore a right to elect. The rule that the jointure, to be a good bar, must be good at the time when it is made, is quite inconsistent with the notion that the deed of 1813 is a valid confirmation of the jointure so as to exclude the right to dower; because it was not a good confirmation at the time when it was made. If the plaintiff had had male issue, her son would have been tenant in tail, and the recovery could not have made the rent-charge good.

\**Mr. Fonblanque, Mr. Temple and Mr. Ward, for the defendants:—* [\*617] Both Lord Hardwicke and Lord Mansfield who concurred in the decision in *Drury v. Drury*, in the reasons which they gave for the opinion, state

(a) 2 Eden. 39; Wilmot's Judgments and Opinions, 177.

(b) 4 Bro. C. C. 500.

(c) 18 Ves. 275.

(d) 4 Bro. C. C. 512.

(e) 5 Ves. 189.

(f) 9 Vin. Abr. 249, pl. 18.

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cases which are exactly applicable to the present, and show that this is a valid jointure. Lord Hardwicke is particular says, (g) that, even where the agreement is originally bad, if there be a general agreement it will be good. The cases of *Vizard v. Longden* (h) and *Davila v. Davila* (i) are decisive on this point. The only question is, whether there is an agreement on the part of the husband. The deed of 1813 is decisive as to this, for it states an agreement. It is true that the agreement could not be carried into effect by that deed; but it is not the less binding, and the plaintiff has no cause for complaint. Though the agreement be not binding on the lands which purport to be charged with it by the deed of 1813, yet the court will enforce it as to lands of adequate value. The charges of fraud in the bill are wholly unsupported and must be abandoned. Both the plaintiff and her father were parties to the deed, and there is no pretence for saying more than that there was a mere failure of title owing to mistake. If the plaintiff had been adult at the time of executing the deed of 1813, she would certainly have been bound by it. *Simpson v. Gutteridge*. (k) But the law holds that, where an infant is dealing by her legal guardian, in such a case she shall be bound by the deed. If this had [\*618] been the case of a legal jointure, there can be no doubt that \*the infant would have been bound by the statute. (l) It is a mistake to suppose that, under the statute 27 Hen. VIII. if the title to the jointure fails, the wife has her dower for the whole; because the words are, that she shall be endowed only of so much as she shall be evicted of. It is enough for the defendants to say that the settlement of 1813 amounts to a contract by the infant to accept a jointure in lieu of dower. *Harvey v. Ashley*. (m) The principle laid down there goes to establish this, that if the law gives an infant authority to contract marriage, it also must clothe the infant with all the authorities necessary to make every part of the contract valid. There is no case to be found in which it has been held that, where there was no fraud, and where the guardian was a party to the agreement of the infant, the infant was not absolutely bound to accept a jointure in lieu of dower. In the cases on this subject what is sought is to have the jointure established, and not to have dower as here. *Clifford v. Burlington*. (n) *Hollingshead v. Hollingshead*. (o) *Clegg v. Clegg*. (p) It must be admitted that, when the title to the rent-charge under the deed of 1813 failed, the husband was bound to make it good. It is not pretended that the rent-charge is not now valid under the deed of 1819, and the recovery.

Mr. Sugden in reply:—The provision, to be a good bar of dower, [\*619] must be certain from the time when it was made. Substitution\* of a certain provision for one which has failed, leaves the wife to her

(g) 2 Eden, 68.

(h) Stated by Lord Hardwicke in *Drury v. Drury*, 2 Eden, 66.

(i) 2 Vern. 274.

(k) 1 Madd. 609.

(l) The authorities as to how far an infant is bound, are collected in Mr. Roper's *Treatise on the Law of Husband and Wife*, 471.

(m) 3 Atk. 607.

(n) 2 Vern. 379.

(o) Gilb. Eq. Rep. 167.

(p) 2 Eq. Abr. 27, pl. 32.

election. This must be a good legal jointure, or it is nothing. And it is clear the husband was not, at any one moment during the coverture, seised of such an estate as to enable him to make the rent-charge valid. A decision against the plaintiff would enable a party to make a bad jointure, and, during the whole period of the coverture, to keep it in his power to confirm it or not. This is not a contract by the husband, but an absolute provision by way of jointure, which turns out to be such as the husband could not grant.

The VICE-CHANCELLOR :—The argument for the plaintiff is that, inasmuch as she was an infant at the time of the marriage, and as the rent-charge proposed to be given to her in bar of dower was then uncertain by reason of the defect of title in the intended husband to the particular lands, she is therefore entitled, upon the authority of *Carruthers v. Carruthers*, to renounce this rent-charge, although it has now become effectual, and to resort to her dower.

In *Carruthers v. Carruthers*, upon the marriage of a female infant, a particular estate, with the consent of her father who with her was a party to the conveyance, was settled upon the husband's mother for life, with remainder to the husband for life; remainder to the intended wife for life in bar of dower. This which in form was a legal jointure was bad at law under the statute, because by reason of the mother's life estate it might not certainly take effect in possession at the death of the husband; and the single question before Lord Alvanley was, whether, in respect \*that the father assented to [\*620] this intended jointure, equity would make that good which at law was clearly void. Lord Alvanley held that the assent of the father could not bind the infant to accept a jointure which wanted one of the essential qualities required by the statute.

In the present case the professed jointure is equitable and not legal, being given to trustees for the benefit of the wife, and not directly to the wife herself. In order to try the application of *Carruthers v. Carruthers*, let it be assumed that the professed jointure was legal, and given directly to the wife herself; and then it is to be asked whether this being a legal jointure, the plaintiff could, under the actual circumstances, renounce it and claim her dower. Now the 7th section of the statute of Hen. VIII. expressly provides that a wife, evicted of her jointure, shall be remitted to her dower only *pro tanto*. If this, therefore, had been a legal jointure, and the settlement had wholly failed as to the particular lands by the defect of title in the husband, the plaintiff could only have claimed dower to the extent of 100*l.* a year; and consequently when the settlement does not fail by reason of subsequent confirmation, if this were a legal jointure she must be bound by it.

If this jointure would, under the circumstances, have bound the plaintiff by the express provisions of the statute if it had been legal, without the assent of her father, then the only question here is, whether the assent of the father shall remove the objection which arises under the statute from the mere equitable quality of the jointure; and all the authorities concur that the assent of the father or guardian shall have that effect.

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[\*621] \*There is another view to be taken of this case. A grant of a rent-charge upon particular lands in consideration of an intended marriage is, in equity, if the grantor be evicted from the particular lands, a general agreement to grant a rent-charge of that amount to be issuing out of some lands. And it is decided in *Drury v. Drury*, that such a general agreement will, in equity, bind a female infant, where the parent or guardian assents to it.

Bill dismissed, without costs.[1]

[1] S. C. affirmed on appeal by Lord Lyndhurst, 5 Russ. 254. The subject of legal and equitable jointure, is examined in *McCartee v. Teller*, 2 Paige, 511. In the matter of *Heron's, minors*, Flan. & Kel. 330. By the revised statutes of New York, (1 R. S. 741,) to constitute a valid bar of dower, the provision by way of jointure must be expressly assented to by the female in writing, if she is an adult, and both by her and her father or guardian if she is an infant: and the distinction between legal and equitable bars is abolished.

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## ACCOUNT.

1. Where payments have been made by a vendee at different times on account of his purchases, all exceeding the interest due at the times of such payments, and the decree in a suit by the vendor for a specific performance directs an account to be taken of what is due to the plaintiff for the principal and interest in respect of the purchase, rests are always made in taking the account. *Griffith v. Heaton*, 271
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2. Where an agreement of reference provides that the award shall be made by four persons, or any three of them, and the award purports to be the award of the four, but is executed by three of them only, it is void. *Thomas v. Harrop*, 524

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1. Husband and wife being defendants, the latter, after obtaining an order to answer separately, is entitled to all the orders for time to answer, and is not bound by any previous order obtained by her husband for that purpose on behalf of himself and her. *Jackson v. Haworth*, 161
2. Husband and wife being defendants, the husband, without obtaining an order for the wife to answer separately, puts in a separate answer stating that his wife did not live with him and therefore he had no influence over her, and being taken into custody on an attachment for want of her answer, the court ordered him to be discharged, and the wife to answer separately, and indemnify her husband in respect of costs. *Garey v. Whittingham*, 163
3. Where husband and wife are defendants, and the husband is abroad, the plaintiff may obtain an order that the wife shall answer separately; but whether either the plaintiff or the husband can obtain this order without notice to the wife, and whether the husband can put in a separate answer before any such order is made; *Qu.* 163
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into her own proper hands, should be good discharges to his trustees. Held, that the wife had power to alienate her life estate. *Action v. White*, 439

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1. Legacy to first and second cousins includes first cousins twice removed. *Silcox v. Bell*, 301
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3. P. B. on his daughter's marriage, settled a sum of money on her and her husband, and their issue; and, after reciting that he had agreed to make a further provision for his daughter equal to his other younger children, covenanted to settle, by his will or otherwise, on the husband and wife and their issue, as great a share of his property as he should by his will or otherwise provide for any of his other younger children, to take effect on the death of the survivor of himself and his wife; and, if he died intestate, or omitted to make such provision, that his executors should pay to the trustees as great a share of his property as his younger children should, in that event, become entitled to. Held, that the trustees had no claim upon the executors for advancements by the settlor to his other younger children in his life-time, but only for a provision equal to that which the other children became entitled to at his death. *Willis v. Black*, 525
4. See DEED, 2, 3.—LEGACY, 2, 3.—WILL, 1, 7, 16, 17, 18, 19, 20.

### CONTEMPT.

1. A defendant, in order to clear his contempt, must not only tender the costs; but, if they are refused, must also obtain an order for discharging his contempt. *Green v. Thomson*, 121
2. Where a defendant is in contempt for want of an answer, and afterwards files it, if the plaintiff acts on the answer he waives the contempt, and the defendant need not obtain an order to discharge it. *Hoskins v. Lloyd*, 393
3. See PRACTICE, 8, 9.

### COPYHOLDS.

The ultimate limitation on a surrender of copy.

holds in default of appointment being to the two first named executors or administrators of the surrenderor, and the custom of the manor not admitting tenants to any larger estate than to two for their joint-lives and the life of the survivor, these executors or administrators are not trustees for the customary heir. Whether the administrators shall hold for their own benefit, or as trustees for the next of kin, *qu.* *Wellman v. Bouring*, 24

### CORPORATION.

If a regular corporate resolution has been passed for granting an interest in the corporate property, and, upon the faith of it, expenditure has been incurred, the court will compel the corporation to make a legal grant in pursuance of the resolution, although it is not under the corporate seal. *Semble. Marshall v. Corporation of Queensborough*, 520

### COSTS.

1. Where the subject of a suit has been disposed of out of court, the court will not hear the cause, merely for the purpose of disposing of the costs. *Roberts v. Roberts*, 39
2. The separate property of a married woman in the hands of the court is liable to the costs of a suit instituted by her touching that property. *Barlee v. Barlee*, 100
3. On demurrer allowed to a bill for a commission to examine witnesses *de bene esse*, the plaintiff having, on an *ex parte* application, obtained an order to examine the witnesses, was ordered to pay to the defendant, besides the usual costs of the demurrer, the costs of the depositions, but not of those taken on cross examination. *Dew v. Clarke*, 108
4. A legatee who filed a bill for his legacy with notice of a prior suit for administering the assets, and the executors who answered the bill instead of moving to stay proceeding in the suit, were refused their costs. *Packwood v. Maddison*, 232
5. The court will not direct the costs of a suit and of an action between the same parties to be set off against each other. *Wright v. Mudie*, 266
6. The party making a successful motion is entitled to his costs as costs in the cause; but the party opposing it is not entitled to his costs as costs in the cause. *Memorandum*, 357
7. The party making a motion, which fails, is not entitled to his costs as costs in the cause; but the party opposing it is entitled to his costs as costs in the cause. 357
8. Where a motion is made by one party and not opposed by the other, the costs of both parties are costs in the cause. 357
9. Where a charity information is filed under 59 Geo. III. c. 91, without a relator, the court has jurisdiction to order the defendant to pay the attorney general his costs. *Attorney General v. Earl of Ashburnham*, 394
10. Where a bill had been amended three times, and the two last amendments were made necessary by the negligence or error of the plaintiffs, the defendant was allowed extra costs for those amendments. *Watts v. Manning*, 421

11. In a suit between the heir and the residuary legatees of the produce of real estate respecting a sum part of such produce the costs were ordered to be borne proportionably by that sum and the residue. *Jones v. Mitchell*, 290
12. The plaintiff in an interpleading suit is entitled to be paid his costs out of the fund. *Campbell v. Solomon*, 462
13. The court has no jurisdiction to order a solicitor's bill to be taxed on the application of the solicitor himself. *Sayers v. Walond*, 97
14. See CONTEMPT, 1. PROCEEDING AMY, 1. SOLICITOR AND CLIENT, 1.

### COVENANT.

1. Where one is in possession of title deeds relating to his own lands, as well as to the lands of another person who has no covenant for the production of the title deeds, whether such other person has a general right in equity to compel the production of the deeds? *Qu. Barclay v. Raine*, 449
2. A covenant to produce title deeds runs with the land for the benefit of purchasers. 449

### DEBTOR AND CREDITOR.

1. A devisee has a right to retain a debt due to himself or to his trustee out of the produce of the estate devised to him. *Loomes v. Stotterd*, 458
2. Where one of the plaintiffs in a creditors' suit dies after a decree, his personal representative has a right to revive. *Qu. If before decree. Burney v. Morgan*, 358
3. A creditor cannot sue on behalf of himself and others, who have no common interest with him. 358
4. The personal representative may retain for his own debt, notwithstanding a decree has been made in a suit by the other creditors for the administration of the assets, and notwithstanding the assets out of which he seeks to retain his debt came to his hands after the decree. *Nunn v. Barlow*, 588
5. Where a creditor takes from his debtor an assignment of a debt due from a third person as a security for his demand, and, by his wilful default, the debt becomes irrecoverable, he must bear the loss. *Williams v. Price*, 581

### DECREE.

1. Where a decree is made upon a bill taken *pro confesso*, the court, whether the defendant has or has not appeared pronounces an absolute decree in the first instance, and does not give the defendant a day to show cause. *Landon v. Ready*, 44
2. Defendant submitting to the same decree as the plaintiff, according to the case made by the bill would be entitled to at the hearing, may at any time stay all further proceedings in the cause. *Fraed v. Hull*, 331
3. See ASSETS, 1, 3. PRACTICE, 16, 17.

### DEED.

1. A married man having lived in adultery with a woman, and had children by her, executes

a deed providing for her and the children in case of his death, and deposits it in the hands of his attorney, but afterwards procures possession of it himself: Held that the woman and her children can maintain a bill to compel him to deliver up this deed. *Knye v. Moore*, 61

2. The construction of a written instrument is the same in equity as at law. *Ball v. Storie*, 210
3. A court of equity will reform an instrument, which, by the mistake of the drawer, admits of a construction inconsistent with the true agreement of the parties, although the party seeking to reform it himself drew the instrument. *Ball v. Storie*, 210
4. See CONSTRUCTION, 2, 3. COVENANT. PETITION. PRACTICE, 25. SETTLEMENT, 2. SOLICITOR AND CLIENT, 3.

#### DEFENDANT.

1. A defendant who has put in three insufficient answers, and is in custody for want of a fourth, is entitled to his discharge immediately on putting in his fourth answer. *Balfour v. Farquharson*, 72
2. A defendant is not a party seeking the aid of the court, and therefore is not entitled to apply for an interlocutory order for his own relief or security, as to the subject matter of the suit, unless the object of his motion may be imposed as a condition on an order applied for by the plaintiff. *Wynne v. Griffith*, 147
3. See CONTEMPT, 1, 2.

#### DEMURRER.

1. A defendant who has pleaded to a bill cannot demur *ore tenus* to it on his plea being overruled; because there is no demurrer on the record. *Hook v. Dorman*, 227
2. See TESTIMONY, (BILL TO PERPETUATE,) 1. COMMISSION TO EXAMINE WITNESSES. JURISDICTION, 5. MULTIFARIOUSNESS, 1, 2, 3. PLEADING, 9, 12. PRACTICE, 40.

#### DEPOSITIONS.

See COSTS, 3. TESTIMONY, (BILL TO PERPETUATE,) 2.

#### DESCENT.

1. Where an infant died seised of an equitable estate descended *ex parte materna*, his incapacity to call for a conveyance of the legal estate, (by which the course of the descent might have been broken,) is not a sufficient reason to induce the court to consider the case as if such a conveyance had actually been made; it not being according to the terms of the trust any part of the express duty of the trustees to execute such a conveyance. *Langley v. Sneyd*, 45
2. Where a person seised of an estate by descent *ex parte materna* dies without issue, the descendants of his maternal grandfather must all be extinct before any descendant of a remoter maternal ancestor can inherit, however nearly related to the *propositus*, *ex parte materna*. *Hawkins v. Shewen*, 257

#### DISCOVERY.

*Prima facie* discovery is incidental to relief. *Angell v. Angell*, 83

#### DONATIO MORTIS CAUSA.

A mortgage or a bond given as a collateral security for money due on mortgage, cannot be made the subject of a *donatio mortis causa*. *Duffield v. Elwes*, 239

#### DOWER.

1. Testator devised gavelkind lands to his wife and two other persons in trust, as to one moiety for his wife during her widowhood, and as to the other moiety, for his children. Held, that the wife must elect between her dower and the provision under the will. *Roberts v. Smith*, 513
2. Widow held to be barred of her dower in equity by a rent charge granted in trust for her by way of jointure by the marriage settlement, to which her father was a party, although she was an infant at the time of the marriage, and the rent charge failed by defect of title in the husband, and was afterwards confirmed by deed and recovery during the coverture; which, though they proved a valid confirmation, might have been defeated if there had been a son of the marriage. *Corbet v. Corbet*, 612
3. Wife evicted of jointure is by stat. 27 Hen. VIII, c. 10, s. 7, entitled to dower only *pro tanto*. *Corbet v. Corbet*, 620
4. Grant of a rent-charge out of particular lands to an infant, in consideration of marriage, for her jointure, though the grantor be afterwards evicted, being in equity a general agreement to grant a rent-charge of that amount out of some lands, will bind the infant if her parent or guardian assented to it, 620

#### ELECTION.

See DOWER, 1.

#### EQUITY OF REDEMPTION.

1. Husband and wife being jointly entitled to an equity of redemption in fee, convey it by deed, without a fine, to the mortgagee: The wife survives, she or her heir may redeem at any time within twenty years from the husband's death. *Price v. Copner*, 347
2. Where the purchaser of an equity of redemption had the legal estate conveyed to him by a deed dated the 24th of August, 1796, in which it was recited, that the purchaser had sometime since paid to the mortgagee the money due on his mortgage, and a bill to redeem was filed on the 29th of January, 1816; Held, that the recital was an acknowledgment of the mortgage till within twenty years from the filing of the bill. *Price v. Copner*, 347
3. If a mortgagee enters in the life-time of the tenant for life of the mortgaged estate, the remainder-man will be barred of his right to redeem after twenty years from such entry. *Harrison v. Hollins*, 471

#### EXAMINATION.

1. The examination of a sequestrator in the mas-

- ter's office does not require the signature of counsel. *Keene v. Price*, 98
2. If after a defendant has put in his examination to the usual interrogatories before the master, the plaintiff discovers that the defendant has received sums not mentioned in his examination, the master is at liberty to receive a new state of facts and further interrogatories founded upon them, without the order of the court. *Sidden v. Foster*, 335
3. *See* WITNESS, 2.

## EXCEPTIONS.

1. Exceptions having been allowed to the answer, and the bill having been amended, and the usual order obtained that defendant should answer the amendments and exceptions at the same time, defendant put in a second answer. The plaintiff then took exceptions to the second answer, and intitled them, "Exceptions to the further answer to the original bill, and to the answer to the amended bill." The exceptions were held to be irregularly intitled, and were ordered to be taken off the file, because new exceptions cannot be taken to the further answer to the original bill, but, if that answer be considered insufficient, it must be referred back to the master upon the old exceptions. *Williams v. Davies*, 426

## EXECUTOR.

1. Testator named two persons to be his executors, and bequeathed to them 50*l.* each, upon condition of their taking upon themselves a certain trust, and afterwards used these words: "I give to my cousin T. K. 50*l.* who I appoint joint executor; and the testator also gave to T. K.'s sisters legacies of 50*l.* each: Held, that the legacy to T. K. was not annexed to the office of executor, and that he was entitled to it although he had declined to act in the trusts of the will. *Dix v. Reed*, 237
2. After a decree for the administration of assets, the executor pleaded a false plea to an action by a creditor of the testator, in order to apply for an injunction to restrain the action; the court granted the injunction, and held that the creditor was not entitled to judgment against the executor *de bonis propriis*. *Fiel-den v. Fielden*, 255

## EXHIBITS.

*See* PRACTICE, 25.

## FOREIGN COURT.

*See* JURISDICTION, 1, 2, 4.

## FRIENDLY SOCIETY.

*See* STOCK.

## GUARDIAN AND WARD

1. Where a guardian, after his ward attains full age, continues to manage the property at the request of the ward, and before the accounts of his receipts and payments during the minority are settled, it is in effect a continuance of the guardianship as to the property; and he must account on the same principle as if they

were transactions during the minority. Under these circumstances an injunction was granted, on terms to restrain the guardian from proceeding in an action to recover the balance claimed by him on account of the transactions after his ward came of age. *Mellish v. Mellish*, 138

2. A solicitor, who advanced money to an infant for the subsistence of himself and his family, and acted as his confidential adviser, is in the nature of a guardian to him; and an account settled between them within a month after the infant came of age, and without the latter having any assistance, was opened, notwithstanding the vouchers had been delivered up. *Revett v. Harvey*, 503

## HEIR.

1. *Qu.* Whether there can be a decree to marshal the assets where the heir at law is an infant. *Pott v. Gallini*, 209
2. *See* TRUST, 1. WILL, 3.

## ILLEGITIMATE CHILD.

- J. S. having contracted a marriage, which was void *ab initio*, and having one son of that marriage, made his will, and gave the residue of his personal estate to all his children by his reputed wife. Held, that the son, being born at the date of the will, was entitled. *Bayley v. Snelham*, 78

## IMPERTINENCE.

A defendant, in answer to an allegation in the bill that some cotton was of inferior quality, said, that from certain affidavits and certificates made by experienced persons, he believed the cotton to be of a superior quality, and set forth the affidavits and certificates in a schedule *in hæc verba*. Held, that the schedule was not impertinent. *Parker v. Fairlie*, 295

## IMPLICATION.

Devise of lands to trustees, upon trust to pay one moiety of the rents to devisee's wife for her life, and the other to his only son; and after his wife's death to convey to his son in fee; but if the son died without issue in the wife's life, to convey to devisee's nephew in fee. The son died without issue in the wife's life. She is not entitled for life, by implication, to the moiety devised to the son. *Aspinwall v. Petre*, 544

## INFANT.

1. *Qu.* Whether there can be a decree to marshal the assets where the heir at law is an infant? *Pott v. Gallini*, 209
2. *See* GUARDIAN AND WARD, 2. TRUST, 1.

## INJUNCTION.

1. All the partners in a publication, except one, being also partners in a rival publication, an injunction to restrain the using of the effects of the former partnership to assist the latter, in consideration of an annual sum, was refused,

- where there had been an agreement permitting the use on those terms, which had been acted on for many years. But the injunction was granted to restrain the use of partnership effects not included in the agreement. *Glassington v. Thwaites*, 124
2. A temptation to the abuse of partnership property is not sufficient to induce the court to interfere by injunction. 124
3. After a decree for the administration of assets, the executor pleaded a false plea to an action brought against him by a creditor of the testator, in order that he might have an opportunity to apply for an injunction to restrain the action; the court granted the injunction, and held that the creditor was not entitled to a judgment against the executor *de bonis propriis*. *Fielden v. Fielden*, 255
4. An injunction may be obtained upon motion to restrain a purchaser under a decree, not a party to the cause, who has not paid his purchase-money, from committing waste on the property purchased. *Casamajor v. Strode*, 381
5. An injunction to restrain the setting up of an outstanding term in bar of an ejectment will not be granted upon motion. *Barney v. Luckett*, *Nerthey v. Pearce*, 419, 420
6. Where an injunction has been granted on merits, a motion to amend without prejudice to the injunction, is a motion of course; but where it has issued on account of delay, notice of the motion must be given, and the proposed amendments must be stated. *Pratt v. Archer*, 433
7. An injunction granted by the Court of Chancery in Ireland to restrain proceedings at law there, is not sufficient to obtain an injunction here to restrain proceedings in K. B. in respect of the same matters. *Ball v. Storie*, 210
8. If a person against whom a verdict has been obtained, afterwards acquires a demand against the party who obtained it, to a greater amount, he is not entitled to an injunction to restrain proceedings on the verdict. *Wylie v. O'Brien*, 551
9. See ANSWER, 2. GUARDIAN AND WARD, 1. JURISDICTION, 1, 4. PRACTICE, C, 9, 12, 22, 41.

## INTEREST.

See VENDOR AND PURCHASER, 1, 4.

## INTERPLEADER.

The plaintiff in an interpleading suit is entitled to be paid his costs out of the fund. *Campbell v. Solomons*. 462

## ISSUE AT LAW.

See PRACTICE, 31.

## JOINTURE.

See DOWER, 2, 3, 4.

## JURISDICTION.

1. Injunction (on terms) granted to restrain mortgagees of a West India estate from proceeding on a bill of foreclosure in the colonial court filed after a decree made in this court, which directed an inquiry to ascertain the amount of the mortgage debt on a bill to re-  
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- deem, all parties being in this country. *Beckford v. Kemble*, 7
2. *Qu.* Whether the mortgagee of a Jamaica estate on a bill of foreclosure in this court is entitled to a decree for sale of the estate according to the law of the colony. 7
3. The Vice-Chancellor has no jurisdiction under the act of 53, Geo. 3. c. 24, to alter, vary or discharge any order made by the master of the rolls. *Whitehouse v. Hickman*, 104
4. An injunction granted by the court of chancery in Ireland to restrain proceedings at law in that country on an interlocutory application, is not of itself a sufficient ground to obtain an injunction in this court to restrain proceedings in an action in the king's bench here in respect of the same matters. *Ball v. Storie*, 210
5. A general demurrer to a bill by the assignees of a bankrupt to restrain an action by him to try the validity of the commission, allowed. *Kirkpatrick and another v. Dennett*, 408
6. The court has no jurisdiction to order a solicitor's bill to be taxed on the application of the solicitor himself. *Sayers v. Valend*, 97

## LEASE.

Where by act of corporation was empowered to purchase subsisting interests in certain hereditaments, and it was directed that the purchase money should be re-invested in land, and in the mean time be laid out in the funds, and the dividends paid to the persons entitled to the rents: Held, that neither persons who had taken leases after the passing of the act, nor the lessors in respect of their right to renew, were entitled to any compensation out of the purchase money. *Bishop of London's case*, 258

## LEGACY.

1. Where a legacy was given on condition of the legatee marrying with the consent in writing of the executors, and he afterwards married with their approbation, but it was not expressed in writing: Held that the legatee was entitled to his legacy, and that the consent of an executor who had not acted was not necessary. *Worthington v. Evans*, 165
2. A bequest of household furniture and other household effects in a dwelling-house and premises, comprises all property kept therein, either for use or ornament. *Cole v. Fitzgerald*, 189
3. Testator named two persons to be his executors, and bequeathed to them 50*l.* each, upon condition of their taking upon themselves a certain trust, and afterwards used these words: "I give to my cousin T. K. 50*l.* whom I appoint joint executor;" and the testator also gave to T. K.'s sisters, legacies of 50*l.* each: Held, that the legacy to T. K. was not annexed to the office of executor and that he was entitled to it although he had declined to act in the trusts of the will. *Dix v. Reed*, 237
4. Where a legacy is given upon a contingency, and a suit is instituted for the administration of the testator's estate, the court does not direct a sum of stock belonging to the estate to

be appropriated to pay the legacy when the contingency happens; but directs the whole residue to be paid over to the residuary legatee, on his giving security to pay the legacy when due. *Webber v. Webber*, 311

5. See WILL, 5, 7, 9, 12, 14, 18. ILLEGITIMATE CHILD. POSTHUMOUS CHILD.

### LEGITIMACY.

1. A child born of a married woman, whose husband is within the four seas, is always presumed to be legitimate, unless there is evidence affording irresistible presumption that sexual intercourse did not take place between them at any time when in the course of nature the husband might be the father of a child. *Head v. Head*, 150  
And see *Banbury Peerage Case*, 153

### LIMITATIONS, STATUTE OF.

1. If a tenant for life has rendered accounts to the remainder-man, of timber cut by him during a period of more than six years before a bill is filed against him for an account of such timber, and of the value of it, the statute of limitations cannot be pleaded to the bill; for though, if the remainder-man had brought an action of trover, the tenant for life might, notwithstanding the rendering of the accounts, have pleaded the statute, he could not have done so if the remainder-man had brought an action of assumpsit. *Hony v. Hony*, 568  
2. If a mortgagee enters in the lifetime of the tenant for life of the mortgaged estate, the remainder-man will be barred of his right to redeem after 20 years from such entry. *Harrison v. Hollins*, 471  
3. See EQUITY OF REDEMPTION, 1, 2.

### LUNATIC.

After a decree in a suit in which a lunatic and his committee were defendants, the committee died and a new one was appointed; ordered, upon motion that the new committee should be named as such in future proceedings in the cause. *Lyon v. Mercer*, 356

### MISTAKE.

A court of equity will reform an instrument which by the mistake of the drawer admits of a construction inconsistent with the true agreement of the parties although the party seeking to reform it himself drew the instrument. *Ball v. Storie*, 210

### MONEY (PAYMENT OF, INTO COURT.)

1. Money admitted by an executor to be in the hands of his partner is in his own hands for the purpose of being paid into court. *Johnson v. Aston*, 73  
2. The court will not compel a vendor to pay the deposit-money into court, though he retains possession of the estate, if the delay in the completion of the contract is occasioned by the purchaser. *Wynne v. Griffith*, 147

### MORTGAGE.

1. The statute 7 Geo. II, c. 20, as to foreclosure, gives no new power to courts of Equity. *Prad v. Hull*, 331  
2. Where the purchaser of an Equity of redemption had the legal estate conveyed to him by a deed dated the 24th of August 1796, in which it was recited that the purchaser had some time since paid to the mortgagee the money due on his mortgage, and a bill to redeem was filed on the 29th of January, 1816; held, that the recital was an acknowledgment of the mortgage title within twenty years from the filing of the bill. *Price v. Copner*, 347  
3. See EQUITY OF REDEMPTION, 1.  
4. Where, in a foreclosure suit, exceptions are taken to the master's report, and the time appointed for payment of the mortgage money is likely to elapse before the exceptions are heard, the defendant should apply to the court, upon the exceptions being filed, to have the time enlarged until the exceptions are disposed of. *Renvoize v. Cooper*, 364  
5. If a third incumbrancer, having constructive notice of the second mortgage, fails to keep the first security on foot for his protection, he is not entitled to stand in the place of the first mortgagee against the second. *Parry v. Wright*, 369  
6. If a mortgagee enters in the life-time of the tenant for life of the mortgaged estate, the remainder-man will be barred of his right to redeem after twenty years from such entry. *Harrison v. Hollins*, 471  
7. See PLEADING, 9, 10. JURISDICTION, 1, 2.

### MULTIFARIOUSNESS.

1. A married man, after having lived in adultery with a woman and had children by her, executes a deed providing for her and the children in case of his death, and deposits it in the hands of his attorney, but afterwards procures possession of it himself: Held, on demurrer, that the woman and her children can maintain a bill to compel him to deliver up this deed, and that the bill was not multifarious, though it also sought performance of an agreement to pay an annuity to the woman, which could not be decreed in equity. *Knye v. Moore*, 61  
2. Two distinct matters cannot be joined in the same suit where one requires that the depositions should not be published till the hearing of the cause, and the other requires an immediate publication of the same depositions. *Dew v. Clarke*, 108  
3. Where under a will the residuary legatees are also appointees of a share of another testator's estate; a bill filed by them for an account of both estates is not multifarious. *Turner v. Robinson*, 313

### NUISANCE.

See SPECIFIC PERFORMANCE, 1.

### OUTLAWRY.

1. A plea of outlawry, to which neither an office copy of the record of outlawry, nor of the ca-

- pias utlagatum*, was annexed, but only a certificate from the clerk of the outlawries, was held to be bad; but leave was given to amend it, because the defect was caused by a mistake of the clerk of the outlawries, and not of the defendant, and did not affect the substance of the plea. *Waters v. Mayhew*, 220
2. A defendant, against whom an attachment was issued for want of an answer, may file a plea of outlawry. *Waters v. Chambers*, 225

### PARTIES.

1. A person with whom a deed had been deposited, but out of whose hands the deed was afterwards taken by the person who had deposited it, need not be made a party to a bill filed against the other person by parties claiming under the deed where no breach of trust is alleged against him. *Kaye v. Moore*, 61
2. The general rule is, that appointees under the will of a feme covert are necessary parties to a suit concerning the fund which is the subject of appointment. *Court v. Jeffery*, 105
3. Where appointees are very numerous, and the bill is filed by some of them, on behalf of themselves and others, the court will dispense with the general rule, which requires all appointees to be parties. *Manning v. Theisger*, 106
4. Where the claim of the next of kin is raised on the record, and one person is in that character a party, other persons found by the master to be next of kin may be heard by the court, though not parties; but where the claim is not raised on the record, and none of the next of kin are in that character parties to the cause, there must be a supplemental bill to bring them before the court. *Waite v. Temple*, 319
5. To a bill filed by an obligee of a joint and several bond for payment of his debt, all the obligors must be made parties. *Bland v. Winter*, 246
6. A share of an intestate's personal estate was assigned to trustees, in trust for the appointees of husband and wife; and in default of appointment, in trust for them and the survivor. Husband and wife sold and assigned this share. The husband died first, and then the wife, having bequeathed all her personal estate to the plaintiff, the husband's personal representative is not a necessary party to a bill, by the legatee to set aside the sale. *Doulin v. Macdougall and Hunter*, 367
7. See CHARITY, I.

### PARTNERSHIP.

1. All the partners in a publication, except one, being also partners in a rival publication, an injunction to restrain the using of the effects of the former partnership to assist the latter, in consideration of an annual sum, was refused, where there had been an agreement permitting the use on those terms, which had been acted on for many years. But the injunction was granted to restrain the use of partnership effects, not included in the agreement. *Glasington v. Thwaites*, 124
2. A temptation to the abuse of partnership property is not sufficient to induce the court to interfere by injunction. 124

3. If, upon a dissolution of partnership, it is agreed that certain articles of the partnership stock shall become the exclusive property of one of the partners, and that a certain fund shall be appropriated to the payment of the debts, and that fund afterwards proves insufficient for the purpose, the other partner has no lien on those articles in respect of such deficiency. *Lingen v. Simpson*, 600
4. A Court of Equity will enforce an agreement made upon a dissolution of partnership, that a particular book used in the trade should become the exclusive property of one of the partners, and that a copy of it should be delivered to the other. 600

### PETITION.

- A person who is not a party to a cause may present a petition in the cause to have deeds, which had been brought into the master's office under the decree, delivered out to him. *Marriott v. White*, 17

### PLEA.

1. A plea of outlawry, to which neither an office copy of the record of outlawry, nor of the *capias utlagatum*, was annexed, but only a certificate from the clerk of the outlawries, was held to be bad; but leave was given to amend it, because the defect was caused by a mistake of the clerk of the outlawries, and not of the defendant, and did not effect the substance of the plea. *Waters v. Mayhew*, 220
2. A defendant against whom an attachment was issued for want of an answer, may file a plea of outlawries. *Waters v. Chambers*, 225
3. To a bill for the delivery of title-deeds, and for an injunction to restrain the setting up of outstanding terms, to which no affidavit as to the title-deeds was annexed, the defendant pleaded that there were no outstanding terms. Plea overruled because it ought to have been confined to so much of the bill as related to the outstanding terms, and because that part of the bill which related to the title-deeds, ought to have been demurred to for want of the affidavit. *Hook v. Dorman*, 227
4. A plea of bankruptcy is good, notwithstanding the commission issued after the filing of the bill. *Turner v. Robinson*, 3
5. Matters which arise after the filing of the bill may be pleaded, by analogy to the rule at law. 3
6. Plea to all the relief, and all the discovery, except certain interrogatories, with an answer to these interrogatories, which did not go to any material point, overruled. *Aliter*, if the answer had been to matter which would have repelled the defence by plea. *James v. Sadgrove*, 4
7. Where there is matter charged by the bill which goes to repel the defence by plea, the plea must be supported by an answer to that matter. 6
8. To a plea of outlawry, either an office copy of the record of the outlawry, or of the *capias utlagatum*, must be annexed. *Waters v. Mayhew*, 220



## PLEADING.

1. To a bill filed by an obligee of a joint and several bond for payment of his debt, all the obligors must be made parties. *Bland v. Winter*, 246
2. Where, under a will, the residuary legatees are also appointees of a share of another testator's estate, a bill filed by them for an account of both estates is not multifarious. *Turner v. Robinson*, 313
3. A creditor cannot sue on behalf of himself and others who have no common interest with him. *Burney v. Morgan*, 358
4. A person entitled to part only of a sum of money due on mortgage cannot file a bill for foreclosure of the same part of the mortgaged estate. *Palmer v. E. of Carlisle*, 423
5. There can be no redemption or foreclosure, unless the parties entitled to the whole of the mortgage money are before the court. 423
6. To a bill to set aside an award charging fraud and corruption in the arbitrator, the defendant answered as to the fraud and corruption, and demurred to the rest of the bill: Held, that the answer overruled the demurrer. *Dawson v. Sadler*, 537
7. If a bill for the specific performance of an agreement states that the agreement was in writing, signature will be presumed. *Rist v. Hobson*, 543
8. See ANSWER, 6. COMMON, 1. MULTIFARI-  
GIOUSNESS, 1, 2, 3. TESTIMONY, (BILL TO PER-  
PETUATE,) 1.

## PORTIONS.

1. Where real estates were devised in strict settle-  
ment, subject to a trust for raising portions  
for younger children during the minority of the  
tenant for life out of the rents and profits, or  
by sale or mortgage: held that certain funds  
which had arisen from the rents during the  
minority of the tenant for life, were applicable  
to the payment of the portions, and that the  
deficiency only could be raised by sale or  
mortgage. *Warter v. Hutchinson*, 276
2. Where a parent who is tenant for life of a set-  
tled estate, with remainder to a trustee for a  
term of 500 years, upon trust to raise portions  
for younger children, has power to appoint the  
portions by deed or will, they cannot be raised  
in the parent's lifetime; and the whole sum  
cannot be raised until they have all attained  
twenty-one. *Wynter v. Bold*, 507

## POSTHUMOUS CHILD.

Bequest in trust for all the children of the testatrix's nephew R. born in the lifetime of the testatrix, includes a child of which the wife of R. was encointe at the time of the testatrix's death, though not born for several months afterwards. *Twyer v. Butts*, 181

## POWER.

1. Settlement of two estates in remainder on A. W. T. for life, with remainder to his sons in strict settlement, and remainder over to M. with power to tenants for life in possession to charge the estates with a jointure of 400l. and power to the settlor to revoke the uses of the

settlement as to one of the estates, and to ap-  
point new uses. By a subsequent deed the  
settlor exercises the power of revocation as to  
the remainder to M.: and in lieu thereof, ap-  
points that estate to S. and repeats several of  
the powers contained in the first settlement,  
and gave power to A. W. T. and S. to charge  
the estate with 400l. by way of jointure. A.  
W. T. by separate deeds executes both powers  
of jointuring. Held, on a bill by his widow  
for both jointures, that A. W. T. had no new  
power to jointure under the second settlement.  
*Wiggell v. Smith*, 321

2. By articles for settlement of the wife's real  
and leasehold estates, the husband had power to  
appoint her estates to the children of the mar-  
riage, for such estates, and in such parties,  
and in such manner and form as he should  
by deed or will appoint: and by other arti-  
cles of the same date, for the settlement of  
his own real estates, he had an absolute power  
of appointment over them by deed or will, in  
default of issue of the marriage. There be-  
ing several children of the marriage, and no  
settlement pursuant to the articles, the hus-  
band, (who died in the lifetime of the wife,)  
by his will recited the articles for the settle-  
ment of his own estates, and confirmed them,  
and recited the power of appointment in them  
at length, mentioning it as a power intended  
to be exercised by that his will: and thereby  
in exercise of that power, and all other powers,  
appointed his own real estates, and all other  
real estates over which he had power, to trust-  
tees for a term of 500 years, upon trust, to raise  
portions for his younger children, making no  
mention, in any part of his will, of the articles  
for settlement of his wife's estate; but direct-  
ing that all persons taking any benefit under  
his will should be bound by the doctrine of elec-  
tion to give effect to every disposition con-  
tained in it: held, that the will operated as  
an appointment of the wife's real estates; and  
that the creation of the term of 500 years was  
a good execution of a power to appoint for such  
estates as the appointor should think fit; and  
that the words 'in such manner and form' au-  
thorized him to give equitable interests to the  
children. *Trotter v. Linton*, 477

## PRACTICE.

1. A person who is not a party to a cause, may  
present a petition in the cause, to have deeds  
belonging to him, which had been brought into  
the master's office under the usual direction in  
the decree, delivered out to him. *Marriott v.  
White*, 17
2. Biddings will not be opened, even in a credi-  
tor's suit, upon an advance of 300l. upon 5,300l.  
*Garstone v. Edwards*, 20
3. An order having been obtained by plaintiff to  
take a demurrer off the file, it is irregular if  
the defendant file a plea and answer before the  
demurrer is actually taken off. *Cust v. Beede*,  
21
4. Where a decree is made upon a bill taken *pro  
confesso*, the court, whether the defendant has  
or has not appeared, pronounces an absolute  
decree in the first instance, and does not give  
the defendant a day to show cause. *Landon  
v. Ready*, 44

5. A defendant who has put in three insufficient answers, and is in custody for want of a fourth, is entitled to his discharge immediately on filing his fourth answer. *Balfour v. Farquharson*, 72
6. If in the title of an order to dismiss a bill for want of prosecution, the plaintiff is called by a wrong christian name, a replication filed after the order is drawn up and served, will not be taken off the file. *Verlander v. Codd*, 94
7. Commissions for the examination of witnesses abroad, returnable without delay, need not be returned within the same period as home commissions; viz. before the end of the term next after they were issued; but a reasonable time is allowed according to circumstances. *Wake v. Franklin*, 95
8. To prevent either an attachment or an injunction, or a motion to extend the common injunction to stay trial, the answer must be filed on the evening before the seal day at the latest; and an answer filed on the seal day is too late, although the motion on account of the pressure of business could not be made until the following day. *Whitehouse v. Hickman*, 102
9. A mistake as to the office hours, (even where the answer was sworn the day before, and was filed at the earliest possible moment on the seal day) is no ground of exception to the general rule that in order to prevent an attachment or an injunction, the answer must be filed the day before the seal day. *Ibbotson v. Booth*, 103
10. Plaintiff having obtained an order to amend, and that defendant may answer exceptions and amendments at the same time, the defendant may immediately move that the amendments be made within ten days, or the order be discharged. *Whitehouse v. Hickman*, 105
11. An attachment for want of an answer to an amended bill, cannot be obtained until the amendments have been entered in the six clerk's book; and it makes no difference whether the original bill has or has not been answered. *Adams v. Blackstock*, 118
12. On a motion for an injunction, affidavits filed before the answer may be read, where the plaintiff, by saving the notice of motion till a future day, enabled the defendant to file his answer before the motion was made. *Glasington v. Thwaites*, 124
13. Where a defendant enters his appearance gratis, the time within which he must answer or sue out a commission, is to be calculated from the date of his actual appearance, and not from that at which the *subpoena* would have been served if he had waited till the regular service. *Webster v. Threlfall*, 135
14. Where the draft of an amended bill is signed by the same counsel who signed the draft of the original bill, and no new engrossment is required, counsel's name need not be repeated on the engrossment. 135
15. Bill, amended by interlineation, ordered to be taken off the file for irregularity, neither the draft nor the engrossment of the amendments being signed by counsel, though there was no new engrossment of the bill. *Pitt v. Mackleu*, 136
16. After a decree for the administration of assets in an amicable suit, a creditor having filed a bill praying for the usual accounts (which had been directed by the former decree, and also to have the assets marshalled, which was not prayed for or decreed in the first suit,) the court made a second decree, directing the usual accounts and the assets to be marshalled, with liberty to the master to use the accounts taken under the former decree. *Pott v. Gallini*, 206
17. If the second suit had been merely for the same objects as the first, the decree in the first suit would have been a bar to it; and the court, on motion before answer, would have ordered all proceedings in it to be stayed. 206
18. Where the answer to a bill for specific performance raises any other objection except defects of title, on a motion to refer the title to the master, the court will not examine whether the other objection be frivolous or not. *Withy v. Cottle. Gordon v. Ball*, 174, 178
19. Husband and wife being defendants, the latter, after obtaining an order to answer separately, is entitled to all the orders for time to answer, and is not bound by any previous order obtained by her husband for that purpose, on behalf of himself and her. *Jackson v. Harworth*, 161
20. A defendant against whom an attachment with proclamations has issued, may file a plea and answer if the writ has not been returned. *Sanders v. Murney*, 225
21. Where one of two or more plaintiffs dies before an answer is put in, the suit is abated, and the defendant cannot move that a supplemental bill be filed within a limited time, as in the case of a plaintiff becoming bankrupt. *Adams v. Hull*, 249
- See 1 Turner's Reports, 258.*
22. An order to dissolve an injunction *nisi*, obtained after exceptions filed to the answer, is irregular. *Williams v. Davis*, 262
23. The master's certificate of disobedience to a decree directing deeds, papers, and writings to be produced before him need not be filed within four days after it is signed; it is sufficient if it be filed before the four-day order is delivered out. *Harris v. De Tastet*, 263
24. The court will order a sequestration to issue against a defendant who is in contempt, for not putting in an examination to interrogatories before the master. *Lupton v. Hecott*, 274
25. The court never orders a clerk in court, with whom exhibits have been deposited under the usual order, to deliver them up to any other person for the purpose of their being produced in court, or at the assizes, without the consent of all parties, and payment of the clerk in court's fees. *Harris v. Bodenham*, 283
26. Defendant submitting to the same decree as the plaintiff, according to the case made by the bill, would be entitled to at the hearing, may at any time stay all further proceedings in the cause. *Prad v. Hull*, 331
27. The principle of waiver applies to an irregular but not to an erroneous order. *Levi v. Ward*, 334
28. After a decree in a suit in which a lunatic and his committee were defendants, the committee died and a new one was appointed.

- Ordered, upon motion, that the new committee should be named as such in all future proceedings in the cause. *Lyon v. Mercer*, 356
29. If after a defendant has put in his examination to the usual interrogatories before the master, the plaintiff discovers that the defendant has received sums not mentioned in his examination, the master is at liberty to receive a new state of facts, and further interrogatories founded upon them, without the order of the court. *Sidden v. Forster*, 335
30. Where in a foreclosure suit exceptions are taken to the master's report, and the time appointed for payment of the mortgage money is likely to elapse before the exceptions are heard, the defendant should apply to the court, upon the exceptions being filed, to have the time enlarged, until the exceptions are disposed of. *Rencioze v. Cooper*, 364
31. Where a decree directs issues to try the validity of moduses, and the plaintiff wishes to have the issues tried in a different county from that in which the lands lie, an order for that purpose cannot be inserted in the decree, but must be obtained by petition. *Sparks v. Ivatt*, 366
32. The court will not order copies of depositions taken to perpetuate the testimony of witnesses to be delivered out for the purpose of perfecting the title to an estate, even where the witnesses are dead. *Teale v. Teale*, 385
33. Where a defendant is in contempt for want of an answer, and afterwards files it, if the plaintiff acts on the answer, he waives the contempt, and the defendant need not obtain an order to discharge it. *Hoskins v. Lloyd*, 393
34. An injunction to restrain the setting up of outstanding terms in bar of an ejectment, will not be granted upon motion. *Barney v. Luckett*. *Northey v. Pearce*, 419, 420
35. Where a bill had been amended three times, and the two last amendments were made necessary by the negligence or error of the plaintiff, the defendant was allowed extra costs for those amendments. *Watts v. Manning*, 421
36. Where an injunction has been granted on merits, a motion to amend without prejudice to the injunction, is a motion of course, but where it has issued on account of delay, notice of the motion must be given, and the proposed amendments must be stated. *Pratt v. Archer*, 433
37. A party who examines a witness is bound to keep him in town for forty-eight hours after his production at the seat of the adverse clerk in court, and, if cross interrogatories are left with the examiner within the forty-eight hours, the party must keep the witness in town till the cross examination is finished. *Whittuck v. Lysaght*, 446
38. A cause may be regularly set down without consent in the vacation after the term in which publication passes. *Partridge v. Cann*, 466
39. There is no precise time beyond which witnesses cannot be discredited. Interrogatories in support of articles for that purpose may relate to particular facts not in issue in the cause, as well as to the credit of the witnesses generally. *Piggott v. Croxhall*, 467
40. After a demurrer overruled, an order for time to answer merely can be obtained by a special application only. *Trim v. Baker*, 469
41. An order to dissolve the common injunction nisi may be obtained, notwithstanding the defendant has excepted to the master's report as to the sufficiency of the answer. *Merrest v. Coster*, 486
42. Where, under an order made in a creditor's suit, a supplemental bill is filed by a creditor, not a party to the original suit, on behalf of himself and all other creditors, to have the benefit of the decree in that suit, the propriety of the order which authorized the creditor to file the supplemental bill cannot be questioned at the hearing of the supplemental cause. When leave is given to file such a bill, the plaintiff in it is entitled to the same decree to have the benefit of former proceedings, as the representatives of the original plaintiffs would have been entitled to on a bill of revivor. *Houlditch v. Marquis of Donegall*, 491
43. After a demurrer overruled, the defendant cannot plead to the bill without the leave of the court. *Rowley v. Eccles*, 511
44. See ACCOUNT, 1. ANSWER 3, 4, 5. ASSETS, 1, 2. BIDDINGS, 1, 2. COSTS, 2, 3. EXAMINATION, 1. MONEY, PAYMENT OF, INTO COURT, 1, 2. PLEA, 1, 2. VENDOR AND PURCHASER, 4. RESIDUE.

## PROCHEIN AMY.

1. A married woman being the plaintiff, and her prochein amy having died, it was ordered that she should name a new prochein amy within two months, or that the bill should be dismissed, and the costs paid out of the fund in court. *Barlee v. Barlee*, 100
2. Where a new next friend is to be substituted, the court refused to inquire into the circumstances of the proposed next friend, though it was suggested that he was in indigent circumstances. *Davenport v. Davenport*, 101
3. Where the next friend of a feme covert had taken the benefit of the Insolvent Debtor's Act, but was detained in prison, and had obtained an order upon the husband for payment of his groats after the answer was filed, and before any other proceeding was taken in the cause, a motion by one of the defendants that the next friend might be removed and another appointed was refused, as being improper in form; but leave was given to apply to stay proceedings until the next friend should be changed, or security given for costs. *Pennington v. Alvin*, 264

## RECEIVER.

This court will appoint a receiver pending a suit in the ecclesiastical court to recall probate, on a case of strong presumption of fraud. *Rutherford v. Douglas*, 111

## RESIDUE.

1. Where a legacy is given upon a contingency, and a suit is instituted for the administration of the testator's estate, the court does not direct a sum of stock belonging to the estate to be appropriated to pay the legacy when the contingency happens; but directs the whole residue to be paid over to the residuary legatee on

- his giving security to pay the legacy when due. *Webber v. Webber*, 311  
 2. See ANNUITY, 3.

RESTS.

Where payments have been made by a vendee at different times on account of his purchase, all exceeding the interest due at the times of such payments, and the decree in a suit by the vendor for a specific performance directs an account to be taken of what is due to the plaintiff for the principal and interest in respect of the purchase, rests are always made in taking the account. *Griffith v. Heaton*, 271

RETAINER.

A devisee has a right to retain a debt due to himself or to his trustee out of the produce of the estate devised to him. *Loomes v. Stotkerd*, 458

RIVER.

Every owner of land on the banks of a river has, *prima facie*, an equal right to use the water, and cannot acquire a right to throw the water back on the proprietor above, or to divert it from the proprietor below, without a grant or twenty years enjoyment, which is evidence of a grant. *Wright v. Howard*, 190

SET-OFF.

The court will not direct the costs of a suit and of an action between the same parties to be set-off against each other. *Wright v. Mudie*, 266

SETTLEMENT.

1. Upon a reference to the master to approve of a proper settlement upon the wife, out of a fund accruing in her right, which was claimed by the assignees of her husband, the court directed the master to have regard to the extent of the fortune received by her husband in her right, as well as to any other settlement which he might have made on her. *Green v. Otte*, 250
2. Settlement of a sum of money upon trust to be transferred to the surviving parent for the benefit of him or her and any child or children of the marriage; held, upon construction of the whole instrument, that the surviving parent took for life, with remainder to the children. *Chambers v. Atkins*, 382
3. Voluntary settlements of personal property made by persons who are not indebted at the time, are good against a subsequent purchaser for valuable consideration. *Jones v. Croucher*, 315
4. See TRUST, 3, 5.

SEQUESTRATION.

See PRACTICE, 24.

SOLICITOR AND CLIENT.

1. The court has no jurisdiction to order a solicitor's bill to be taxed, on the application of the solicitor himself. *Sayers v. Walond*, 97

2. A solicitor who had refused to act any longer for a party in the cause, was ordered to permit the party to inspect papers in his possession, at all reasonable times without any undertaking on his part to proceed to a taxation of his bill. *Moir v. Mudie*, 282
3. A solicitor who refused to allow a deed in his possession to be proved on behalf of the plaintiff, because he had a lien on it for costs due from the defendant, was ordered to produce the deed at his own expense, and to pay all the costs consequent on his refusal. *Brassington v. Brassington*, 455
4. See DEED, 1.

SPECIFIC PERFORMANCE.

1. Specific performance of an agreement to grant a building lease, decreed generally, although the plaintiff had built a brewhouse upon part of the land comprised in the agreement, and thereby injured the adjoining property of the lessor. *Gorton v. Smart*, 66
2. Specific performance decreed of an agreement to sell the good will of a trade, and the exclusive use of a secret in dyeing. *Bryson v. Whitehead*, 74
3. Where damages in an action at law for breach of a contract to sell a chattel would be an insufficient remedy for the purchaser, although a sufficient remedy for the vendor, a demurrer to a bill by the vendor for a specific performance will be overruled, because the remedy in this court must be mutual for purchaser and vendor. *Withy v. Cottle*, 174
4. Where the answer to a bill for a specific performance raises any other objection to the performance of the contract besides defects in the title, on a motion for a reference of the title to the master, after the answer has come in; *semble*, that the court will not examine whether the other objection be frivolous or not, because that is matter to be decided at the hearing of the cause. 174
5. *Semble*, that the court will not, on motion, decide upon the validity of any other objection, besides defect of title, which may be raised by the answer to a bill for specific performance, the consideration of any other objection being matter to be reserved till the hearing of the cause. *Gordon v. Ball*, 178
6. The court refused to decree the specific performance of an agreement to purchase the fee simple of certain lands, and also the right to impound the water of a river, and to divert from it a stream of water, because the vendor, though seized in fee of the lands, had only a lease for 99 years of the other subjects of the contract, and had not, as against some of the proprietors of land on the banks of a river, a right to divert the water, the purchaser having entered into the contract for the purpose of erecting a manufactory to be wrought by the water, and twelve years having elapsed between the time of the agreement and the hearing of the cause. *Wright v. Howard*, 190
7. Bill for specific performance of an agreement to take a lease for 42 years of iron and coal mines and machinery for the purpose of trade, dismissed, on account of delay on the part of

- the lessor to make out his title and to give possession at the time stipulated in the agreement. *Parker v. Frith*, 199
8. Bill will lie for the specific performance of a contract for the purchase of government stock, where it prays for the delivery of certificates which give the legal title to the stock. *Doloret v. Rothschild*, 590
9. Time is of the essence of a contract, where the subject of the contract is of such a nature as to be exposed to a daily variation in its value. 590
10. Specific performance decreed at the suit of the vendor of a contract for the sale of debts proved under a commission of bankrupt. *Adlerly v. Dixon*, 607
11. See AGREEMENT. PARTNERSHIP. 4.

## STOCK.

A sum of money in the funds, standing in the name of two trustees of a friendly society one of whom had absconded, ordered to be transferred by the other trustee into his own name jointly with that of another trustee elected in the room of him who had absconded. *In the matter of a Friendly Society*, 62

## TENANT FOR LIFE.

Tenant for life of real estates under a will having expended money in finishing a mansion-house which the testator had begun but left unfinished, and in repairing the mansion-house, which had been damaged by dry-rot, the court, in a suit for administering the trusts of the will, referred it to the master to inquire whether it was for the benefit of all parties interested that the mansion-house should be finished, but refused an inquiry as to the repairs; and said that if it was found for the benefit of all parties interested that the mansion-house should have been finished, the court would if, there were no personal estate applicable, direct the expense to be a charge on the real estates. *Hibbert v. Cooke*, 552

## TERM OF YEARS.

An injunction to restrain the setting up of an outstanding term in bar of an ejectment, will not be granted upon motion. *Barney v. Luckett, Northey v. Pearce*, 419, 420

## TESTIMONY, (BILL TO PERPETUATE.)

1. A demurrer will hold to a bill to perpetuate testimony if it do not state that no action can be immediately brought. *Angell v. Angell*, 83
2. The court will not order copies of depositions taken to perpetuate the testimony of witnesses to be delivered out for the purpose of perfecting the title to an estate, even where the witnesses are dead. *Teale v. Teale*, 385

## TITHES.

1. At the trial of an issue to ascertain whether one of the defendants, a layman, was entitled to the tithes, or a modus in lieu of the tithes of

certain lands it was proved that a payment described as a tithe or rate-tithe issuing out of the lands in question, had been conveyed by the defendant's title-deeds for the last 150 years, and that this payment had been received by him and his ancestors, and that no tithe had been paid to the plaintiff, the rector, within living memory; and a verdict was found for the defendant. A motion by the rector for a new trial was refused. *Williams v. Bacon and others*, 415

## TRADE.

1. A trader may sell a secret in his trade, and restrain himself generally from the use of it. *Bryson v. Whitehead*, 74
2. Specific performance decreed of an agreement to sell the good-will of a trade, and the exclusive use of a secret in dyeing. 74

## TRUST.

1. Where an infant died seized of an equitable estate descended *ex parte matris*, his incapacity to call for a conveyance of a legal estate, by which the course of descent would have been broken, is not a sufficient reason to induce the court to consider the case as if such a conveyance had actually been made; it not being according to the terms of the trust, any part of the express duty of the trustee to execute such a conveyance. *Langley v. Sneyd*, 45
2. Testator gives the residue of his estate to his executors on trust, in default of appointment, to dispose of it at their pleasure, either for charitable or public purposes, or to any person or persons, in such shares, &c. as they, in their discretion should think fit: held that the trust is too general and undefined to be executed by the court; that the executors cannot take, because it is given expressly on trust; and that the next of kin are entitled. *Vesey v. Jamson*, 69
3. G. E. conveyed real estates upon trust for the benefit of his daughter; but he declared that if she married under age, and without his consent, the trustees should hold the estates in trust for him and his heirs. The daughter married under twenty-one and without consent; but G. E. was afterwards reconciled to her, and treated both her and her husband with great kindness: held that this conduct of the father did not divest the equitable fee which had vested in him on the marriage. *Duffield v. Elwes*, 239
4. Testator gave to his wife all his personal estate, relying that if she should marry again she would secure whatever she should possess under his will, for her separate use; and he recommended her to give by her will, what she should die possessed of under his will, to certain persons whom he named: held that the wife's executor was a trustee of the whole of the property possessed by her under the will, for the persons named. *Harwood v. West*, 387
5. The sole possessor of a recipe for making a medicine assigned it on the marriage of his daughter to trustees in trust for her and her

- husband for their lives, and directed that after their decease it should be sold for the benefit of their children. The mother destroyed the recipe and verbally communicated the contents to her eldest son for the benefit of his brothers and sisters. Upon a bill filed against him by some of the younger children he was declared to hold the secret upon the trusts of the settlements, and was decreed to account for the profits made by him by the sale of the medicine after his mother's death; and, as a sale was impracticable, an issue was directed to ascertain the value of the secret. *Green v. Folgham*, 398
6. *Qu.* Whether the rule, that a trustee cannot purchase from his *cestui que trust*, prevails where the relation of trustee gives no advantage? *Naylor v. Winch*, 555
7. See WILL, 8.

### VENDOR AND PURCHASER.

1. Where the conditions of sale provide that interest shall be paid from a certain day, if the purchase be not then completed, the purchaser cannot relieve himself from the payment of interest by alleging that the delay in completing the contract was caused by the vendor; but it is otherwise where there is no express stipulation. *Edaile v. Stephenson*, 122
2. Quit rents being incidents of tenure, are proper subjects of compensation. *Qu.* as to rent-charges, which are not incidents of tenure, though the court has allowed them when small to be subjects of compensation. 122
3. *Qu.* To what extent time is of the essence of the contract, where the purchase is intended with a view to commercial purposes as to the erection of a manufactory. *Wright v. Howard*, 190
4. Where payments have been made by a vendee at different times on account of his purchase, all exceeding the interest due at the times of such payments, and the decree in a suit by the vendor for a specific performance, directs an account to be taken of what is due to the plaintiff for the principal and interest in respect of the purchase, rests are always made in taking the account. *Griffith v. Heuton*, 271
5. Where a devisee of real estate subject to debts and legacies, had contracted to sell the estate in order to raise money to pay the debts, and afterwards a bill was filed against her by the legatees for the administration of the testator's estates, and the purchaser consented to go before the master upon a reference as to the title in that suit: held, that he was not thereby bound to take an equitable title, but might insist on having the same title as he might have required if a suit had been instituted against him for a specific performance of his contract; and that as two commissions of bankrupt had issued against the devisee before the contract was entered into though neither of them was proceeded in, he was not bound to accept the title. *Cann v. Cann*, 284
6. An injunction may be obtained, upon motion to restrain a purchaser under a decree, not a party to the cause, who has not paid his purchase money, from committing waste on the property purchased. *Casemajor v. Strobe*, 381

7. Where the purchase money for an estate was, in pursuance of an agreement for the purchase, secured by the bond of the purchaser, payable at the death of the vendor, with interest; but the conveyance expressed that it had been paid, and had the vendor's receipt indorsed upon it: held, that the vendor had no lien on the estate for the amount of the bond. *Winter v. Lord Anson*, 434
8. Where a conveyance is executed to a purchaser, which expresses that the purchase money is paid, the estate does not, in equity, pass by the conveyance till the purchase money is actually paid, although a receipt for the purchase money is endorsed on the conveyance. 434
9. Where a vendor agrees to sell a real estate in consideration of a bond for the purchase money payable at a future period, with interest in the mean time, the estate passes to the purchaser on the execution of the bond and of the conveyance, and the vendor has no lien for the amount of the bond. *Winter v. Lord Anson*, 434
10. A purchaser is not bound to complete his purchase, without the title deeds, unless he has a legal covenant to produce them. *Barclay v. Raine*, 449
11. See MONEY, PAYMENT OF, INTO COURT, 2. SPECIFIC PERFORMANCE.

### VOLUNTARY SETTLEMENT.

See SETTLEMENT, 3.

### WASTE.

If a tenant for life has rendered accounts to the remainder-man of timber cut by him during a period of more than six years before a bill is filed against him for an account of such timber and of the value of it, the statute of limitations cannot be pleaded to the bill; for though, if the remainder-man had brought an action of trover, the tenant for life might, notwithstanding the rendering of the accounts, have pleaded the statute, he could not have done so if the remainder-man had brought an action of assumpsit. *Honey v. Honey*, 568

### WILL.

1. Testatrix gave all her personal property to E. R.; and in case E. R. married and had a child or children, then to go to the heirs of E. R.; but in case E. R. should die without a child or children and leave a husband, then the interest to him for life, and four legacies of stock to certain other persons; and if E. R. should die unmarried, then she gave several small legacies to other persons. E. R. died without ever being married. Held, that the gift to E. R. was subject in one event, to the legacies of stock, and in another event, to the small legacies; and that, in the event which happened, the legacies of stock failed, but the small legacies took effect. *Swayne v. Smith*, 56
2. Where real estates were devised in strict settlement, subject to a trust for raising portions for younger children during the minority of the tenant for life, out of the rents and profits, or by sale or mortgage: held that certain funds which had arisen from the rents during the minority of the tenant for life, were applicable

- to the payment of the portions, and that the deficiency only could be raised by sale or mortgage. *Warter v. Hutchinson*, 276
3. N. H., by will, gave 800*l.* out of the money to be produced by the sale of her real estates to trustees for the benefit of certain charitable institutions, and she gave the residue of the money to J. R. The gift of 800*l.* being void, her heir is entitled to it, and not J. R. *Jones v. Mitchell*, 290
  4. Where the decree referred it to the master to inquire whether a testator left any relations of the degree of first or second cousins; held that first cousins twice removed ought to be included in the report. *Silcox v. Bell*, 301
  5. I. W. bequeathed 1,000*l.* stock to trustees, in trust to pay the dividends to his daughter whilst she remained single; and provided she married with the consent of his trustees, he authorized them to advance to her husband such part of the stock (not exceeding one-third) as they thought proper; and he declared certain trusts of the remainder for the benefit of his daughter and her children. But if she married without the consent of the trustees, he declared certain trusts of the whole fund for the benefit of his daughter and her children. She married in I. W.'s lifetime, and without his consent, but he was afterwards reconciled to the marriage. Held, that the husband was entitled to one-third of the stock, and that the remainder was to be held upon the same trusts as it would have been, had the daughter married after I. W.'s death, and with the trustee's consent. *Wheeler v. Warner*, 304
  6. Testator bequeathed to his wife the use of his furniture, &c. which he desired to be distributed among his children when the youngest attained twenty-one, at her and his executor's discretion; such part to be reserved for her use as might be thought reasonable, and at her death to be distributed as above directed. Held, that those children who died before the youngest attained twenty-one did not take vested interests. *Ford v. Rawlins*, 328
  7. Testatrix bequeathed one moiety of the residue of her personal estate to her daughter Hannah, for her separate use, during the joint lives of her and her husband; and if she survived, to her absolutely; if not, to her children who should attain twenty-one; and she bequeathed the other moiety for the benefit of her daughter Mary and her children; with a bequest over, if she died without children, to Hannah and her children, in like manner as the first moiety. By a codicil, she bequeathed the whole residue, if both her daughters died without issue, but Hannah survived her husband: held, nevertheless, that A. was entitled to the residue. *Hopkins v. Towle*, 337
  8. Testator gave to his wife all his personal estate, relying, that if she should marry again she would secure whatever she should possess under his will for her separate use; and he recommended her to give, by her will, what he should die possessed of under his will to certain persons whom he named: held, that the wife's executor was a trustee of the whole of the property possessed by her under the will for the persons named. *Horwood v. West*, 357
  9. Where an annuity is given by will, with a direction that it shall be paid monthly, the first payment is to be paid at the end of a month after the testator's death. *Houghton v. Franklin and others*, 390
  10. Testator devised a freehold estate to trustees, in trust to pay the rents, as the same should become due and payable, into the hands of his wife, and not otherwise, for her life, for her separate use; and directed that the receipts of his wife alone for what should be actually paid into her own proper hands, should be good discharges to his trustees: held, that the wife had power to alienate her life estate. *Acton v. White*, 429
  11. Bequest in trust for all the children of A. born in testator's life-time, includes a child of which A.'s wife was *eniente* at the testator's death. *Trower v. Butts*, 181
  12. Bequest of household furniture and other household effects in a dwelling house and premises, comprises all property kept there, either for use or ornament. *Cole v. Fitzgerald*, 189
  13. Devise to first and second cousins includes first cousins twice removed. *Silcox v. Bell*, 301
  14. A bequest of stock to trustees, upon trust to pay the dividends from time to time to a married woman, for her separate use, is an unlimited gift of the dividends, and consequently passes the capital. *Haig v. Swiney*, 487
  15. S. H. bequeathed the dividends of her property in the funds to W. H. for his life, and directed that, after his decease, the principal should be divided amongst his children in the manner afore-mentioned; she then gave the children certain sums of money, which would have exhausted the whole of her funded property at the date of her will. Between that time and her death, that property had greatly increased. Held, that the executors were entitled to the surplus, as undisposed of. *Haynes v. Littlefair*, 496
  16. The "securities for money," in a will, pass stock in the funds, unless the force of the expression is controlled by the context. Whether bank stock will pass by the same words? *Qu. Bescoby v. Peck*, 500
  17. Testator directed the interest of a sum of money to be paid to his sisters during their lives, in equal proportions, and at their deaths gave to their children the inheritance their mothers derived from his estate, and desired that his sisters should be the residuary legatee, in the proportions already noticed. Held, that the sisters were entitled to the residue absolutely, and that their children took no interest in it. *Grassick v. Drummond*, 517
  18. Testator, after giving some legacies, directs payments to be made to his devisees, as under; and then mentions certain persons, and the sums to be paid to them, and gives the residue to all his devisees above mentioned in proportion to their legacies. Every one of the legatees is entitled to a share. *Coope v. Banning*, 534
  19. Devise of lands to trustees, upon trust to pay one moiety of the rents to deviseor's wife for her life, and the other to his only son: and after his wife's death to convey to his son in fee; but if his son died without issue in the wife's

life, to convey to devisor's nephew in fee. The son died without issue in the wife's life. She is not entitled for life, by implication, to the moiety devised to the son. *Aspinall v. Petrin*, 544

90. Testator gave his son an absolute interest in one-fourth of his personal estate; but, by a codicil, he directed that his son's share should be only for the life of himself and his wife, provided they had no issue, and that, at their death, it should fall into the residue: Held, that the son did not take absolutely, but subject to an executory bequest over, in case there was no issue of himself and his wife living at the death of the survivor. *Rackstraw v. Vile*, 604

WITNESS.

1. Where a witness left London before the forty-eight hours were expired, the party producing him was ordered to bring him back at his own expense, or the examination in chief to be suppressed. *Whittuck v. Lysaght*, 446
2. There is no precise time beyond which witnesses cannot be discredited. Interrogatories in support of articles for that purpose may relate to particular facts not in issue in the cause, as well as to the credit of the witnesses generally. *Piggot v. Croxhall*, 467
3. See PRACTICE, 37.





**REPORTS**  
**OF**  
**C A S E S**

**DECIDED IN THE**

**HIGH COURT OF CHANCERY,**

**BY**

**THE RIGHT HON. SIR JOHN LEACH,**

**VICE-CHANCELLOR OF ENGLAND.**

---

**BY NICHOLAS SIMONS AND JOHN STUART,**  
**OF LINCOLN'S INN, ESQUIRES, BARRISTERS AT LAW**

---

**WITH NOTES AND REFERENCES,**  
**TO BOTH ENGLISH AND AMERICAN DECISIONS;**

**BY JOHN A. DUNLAP,**  
**COUNSELLOR AT LAW.**

**VOL. II.**

**1824, 1825, 1826—5, 6, & 7 Geo. IV.**

**NEW-YORK:**  
**PUBLISHED BY GOULD, BANKS & Co.**  
**LAW BOOKSELLERS, NO. 144 NASSAU STREET;**  
**AND BY WM. & A. GOULD & Co.**  
**NO. 104 STATE STREET, ALBANY.**

**1843.**

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Entered according to the Act of Congress, in the year eighteen hundred and forty-three, by

**GOULD, BANKS & Co.**

in the Office of the Clerk of the Southern District of New-York.

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**ALEXANDER S. GOULD, PRINTER,**  
144 Nassau Street, N Y.

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SIR J. S. COPLEY, SIR CHARLES WETHERELL,  
SOLICITORS GENERAL.

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## MEMORANDUM.

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The following cases, reported in this and the preceding volume, have been affirmed on appeal :—

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\* Affirmed in the House of Lords.

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# CASES IN CHANCERY

BEFORE THE

## THE VICE-CHANCELLOR.

\*BARFIELD v. NICHOLSON.

[\*1]

1824, 1st, 19th and 20th February.—*Copyright.*

Copyright may be either in respect of the matter or the arrangement; but no property can be acquired in an article copied from a prior work.

An author having sold the copyright of a work published under his own name, and covenanted with the purchaser not to publish any other work to prejudice the sale of it; *semble*, that another publisher, who had no notice of this covenant, will be restrained from publishing a work subsequently purchased by him from the same author, and published under his name, on the same subject, but under a different title, and though there be no piracy of the first work.

THIS was a bill to restrain the defendants from printing and publishing a work entitled *The Practical Builder*, or any other work prejudicial to the sale of *The Architectural Dictionary*, a work belonging to the plaintiff.

The defendant Nicholson having written a work called *The Architectural Dictionary*, by an indenture dated the 3d of March, 1821, made between him of the one part, and the plaintiff of the other part, in consideration of the sum of 250*l.* sold and assigned to the \*plaintiff all his copyright [\*2] in the work; and by the same indenture he for himself, his executors and administrators covenanted, promised and agreed to and with the plaintiff, his executors, administrators and assigns, that he would not write or publish, or cause or procure to be written or published, any abridgment of that work, or any part thereof, or any other kind of publication, which might prove prejudicial or detrimental to the sale of *The Architectural Dictionary* and that he would not in any manner, either directly or indirectly, impede the circulation or publication thereof.

The bill, after stating this indenture, alleged that Nicholson, in violation of his covenant, had, in July, 1823, prepared and written a work, called *The Practical Builder*, which contained, in substance, the greatest part of the information comprised in *The Architectural Dictionary*, and had also introduced into it many of the designs and plans, and a part of the substance of the letter-press of *The Architectural Dictionary*. It also stated, that the defend-

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 1824.—Barfield v. Nicholson.
 

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aut Kelly who was a bookseller, had printed, published and sold many thousand copies of *The Practical Builder*, under the direction of Nicholson; and that Nicholson and Kelly were joint owners and proprietors of *The Practical Builder*. The plaintiff stated himself to be the sole owner of the copy-right of *The Architectural Dictionary*.

The bill charged that many of the plans and designs in the plates of *The Architectural Dictionary* were original, and had never been published in any other work; and that Nicholson had introduced into *The Practical Builder*, and had printed and published in that work, a great number of [\*3] these original plans and designs; and had even acknowledged that the substance of the letter-press of *The Practical Builder* was the same as that of *The Architectural Dictionary*: that the plaintiff had, previously to that publication, derived great profits from the sale of *The Architectural Dictionary*, but that the sale of that work had been greatly injured by the publication of *The Practical Builder*.

Soon after the bill was filed, the court was moved, on the part of the plaintiff, for an injunction to restrain the publication, *The Practical Builder*. In support of this motion, an affidavit was filed by the plaintiff to the truth of the allegations in the bill. There were also affidavits of an architectural bookseller and a builder in support of the plaintiff's case, stating that they had compared certain plates in *The Practical Builder*, specified in the affidavits, with the plates in *The Architectural Dictionary*, and that, in their judgment, the designs and plans contained in the plates in *The Practical Builder*, were, similar to and copied from the corresponding designs and plans in the plates in *The Architectural Dictionary*; and that, although many of them varied slightly, yet that they were substantially the same, conveying the same information, and illustrating the same subjects; that *The Practical Builder* purported to give information on the same subjects, and was written on the same principle, and, in many cases, copied from *The Architectural Dictionary*, and was calculated altogether to supersede that work.

On this motion, the Vice-Chancellor granted an injunction *ex parte*; [\*4] observing, that the covenant by \*Nicholson in the deed of 1821, was, *prima facie*, sufficient to entitle the plaintiff to an injunction *ex parte*, without entering into the question of piracy.

The defendants afterwards put in their answers. The answer of Kelly stated that *The Architectural Dictionary*, when first published, was not an original work, either in its letter-press or plates, though it might contain some original letter-press, designs and plates; but that the original matter formed a very small portion of the whole work; that, until this bill was filed, he was wholly unacquainted with the arrangement between the plaintiff and Nicholson and with the deed of 1821; that, in the beginning of 1821, he, being a publisher and bookseller in extensive business, for his own sole and exclusive benefit planned the work or publication called *The Practical Builder*; that the

1824.—*Barfield v. Nicholson.*

defendant Nicholson, being an architect of great eminence, in consequence of the reputation which he had acquired by various publications on carpentry and architecture, he was induced to employ him occasionally in the composition of *The Practical Builder*, and to apply to him to use his name as the author of the work, although, in fact, he was only occasionally employed to write some parts of it, and to design some of the figures; but that he (Kelly) employed other men of science to write the residue of the letter-press, and employed Michael Angelo Nicholson, (the son of the defendant Nicholson,) to design the residue of the figures; and that, of the forty-six plates already published, M. A. Nicholson had designed twenty-two, and the defendant, Nicholson, twenty-four; and that the whole of these designs were brought to and paid for by him (Kelly) as original designs, and that the original drawings of the designs, so brought to him, \*were still in his possession, [\*5] ready to be produced; that, since this bill was filed, he had been induced to inquire as to the originality of these designs, and found that many of them were not original, but taken from works published many years ago, the copyright in which had long since expired, or from works in common circulation, without any objection on the part of the owners of such works; but that not one of the designs or drawings was copied from the designs and drawings of *The Architectural Dictionary*, although, on a casual inspection, a great imitation appeared between some of these designs and drawings and those contained in *The Architectural Dictionary*; but that this similarity arose from the nature of the subject, and not from their being copied; that every one of the plates and figures, and the letter-press, which the affidavits of the plaintiff stated to be piracies from *The Architectural Dictionary*, had, in fact, appeared in prior works; and he denied, to the best of his knowledge, judgment and belief, that any passage in his work was a piracy of, or copied from the plaintiff's work; but, on the contrary, that *The Practical Builder*, was, so far as the subject would admit, an original work. The answer also denied that Nicholson was a joint-owner in *The Practical Builder*, or in any manner interested in the produce or profits of it and, therefore, denied that the publication of that work was a breach or violation of the covenant between the plaintiff and Nicholson.

The defendant Kelly having put in this answer, the court was now moved, on his behalf, to dissolve the injunction as against him.

*Mr. Solicitor-General*, and *Mr. Wakefield*, for the motion.

\**Mr. Heald*, *Mr. Sudgen*, and *Mr. Roots*, for the plaintiff, contra. [\*6]

**THE VICE-CHANCELLOR:**—*The Architectural Dictionary*, and *The Practical Builder*, are plainly both works upon the same subjects, namely, the science of architecture and the art of building. The question is, whether the latter work is a piracy upon any part of the former work which the author of that work had a right to claim as his own property, in respect that it was his own composition.

Composition is either in new matter or new arrangement. The arrange-

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1824.—*Barfield v. Nicholson*.

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ment in the two works is altogether different. In *The Architectural Dictionary* the information is scattered through the whole work, under the head of each particular term of science or art, arranged in alphabetical order: in *The Practical Builder* the information is conveyed in the connected form of a treatise. If there be piracy here, it must be piracy of the matter of *The Architectural Dictionary*. The general answer of the defendant is, that *The Practical Builder* was conceived and planned by him as a speculation on his own account, and that he employed various artists in the execution of this work, and, among others, Nicholson and his son; and especially in the plates; and that he paid for every thing as original design; and that, if it be a piracy, he is himself imposed upon.

*The Practical Builder*, as far as published, consists of forty-six plates; and the affidavits allege that thirteen of these plates contain one, two, three or four figures, which are imitations of figures contained in *The Architectural* [\*7] *Dictionary*; and the particular figures \*are pointed out in the affidavits.

The entire resemblance of these figures, though in some instances denied, is generally admitted; but it is said this resemblance is no proof of imitation. The figures of geometry must necessarily resemble each other in all works: and, in a great degree, this applies to the figures of architecture or building, where they are descriptions of things in use, as, for instance, in one of the articles, roofs. Where two works describe the figures of roofs in use they must necessarily produce resembling figures. And the defendant then proceeds to show, that the figures used in his plates, supplied by the Nicholsons, are not, in fact, piratical copies of the plaintiff's work.[1] The defendant does not deny (what could not be denied) that if the Nicholsons, whom he employed, piratically copied these figures from the plaintiff's works, that he is bound by their acts as the acts of his agents, and that piracy in the Nicholsons is piracy in him.

As to those figures in which he admits resemblance, he says there is not one of them which was not given to the public in some or many works prior to *The Architectural Dictionary*; that some of these prior works were the works of Nicholson himself, as the articles of architecture in *Rees's Cyclopaedia*, and the same articles in *Brewster's Encyclopedia*, and *The Carpenter's Guide*, published in 1792. And he says further, that not only were these figures extant prior to *The Architectural Dictionary*, but that the Nicholsons had not in fact recourse to *The Architectural Dictionary* for them, nor to any materials collected for *The Architectural Dictionary*. Upon reference to the prior publications, it is proved to be indisputably true that there is not one of these

[1] "Any man is entitled to avail himself of the labors of all former writers whose works are not subject to copyright, and of all public sources of information; but whilst all are entitled to resort to common sources of information, none are entitled to save themselves trouble and expense by availing themselves for their own profit, of other men's works still subject to copyright and entitled to protection." Lord Langdale, *M. R. Lewis v. Fullarton*, 2 Beav. 8. See also, *Mawman v. Tegg*, 2 Russ. 385.

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 1824.—*Barfield v. Nicholson.*


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figures which had not been given to the world \*prior to The Architectural Dictionary ; and, the matter not being new, the author of The Architectural Dictionary could acquire no property in these figures except by a new arrangement ; but there is clearly no novelty in his arrangement. The figures of The Architectural Dictionary are introduced to illustrate the letter-press ; and so are all figures in prior works, as well as in The Practical Builder.

If therefore the figures furnished by Nicholson for The Practical Builder had in fact been copied from The Architectural Dictionary, this would have been no piracy, because the author of The Architectural Dictionary had no property in these figures. But the Nicholsons, both father and son, positively swear that these figures were not copied from The Architectural Dictionary, nor from any materials collected for The Architectural Dictionary.

With respect to the letter-press, the affidavits filed by the plaintiff do not point out particular instances of invasion ; but upon the motion, I was referred to the article roofs, which is nearly a verbatim copy of the same article in The Architectural Dictionary. The defendant's answer here is the same as to the figures. This article was published verbatim in the Encyclopedia prior to The Architectural Dictionary, and is not therefore the property of the plaintiff.

Let the injunction be dissolved against Kelly ; but the plaintiff being desirous to try this case at law, and undertaking immediately to bring an action against Kelly, let Kelly in the mean time keep an account of the copies sold by him.

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\*The following were the orders which were made by the Vice-Chancellor. [\*9]

21st Nov. 1823.—“ This court doth order, that the defendants, Peter Nicholson and Thomas Kelly, be respectively restrained by the injunction of this court from further writing, printing, publishing and selling, or exposing to sale by themselves, or their agents or servants, the work or publication called The Practical Builder, in the bill mentioned, or any number or parts thereof, or any other book or publication which may prove prejudicial or detrimental to the sale of the plaintiff's work, called The Architectural Dictionary, and also from impeding in any manner, directly or indirectly, the circulation or publication thereof, until the said defendants shall fully answer the plaintiff's bill, or this court make other order to the contrary.”

Reg. Lib. A. 1823, f. 378.

20th Feb. 1824.—“ This court doth order, that the injunction granted in this cause, as against the defendant, Thomas Kelly, be dissolved, the said defendant by his counsel undertaking to keep an account of the profits to arise by the sale of the said book, called The Practical Builder, until the trial of any action at law which the plaintiff may be advised to bring touching the matters in question in this cause.”

Reg. Lib. A. 1823, f. 699.

The plaintiff appealed to the Lord Chancellor against this last order. The

1824.—*Burr v. Mason.*

case was argued for several days, and his lordship ultimately pronounced the following order:—

27th July, 1824.—“ His lordship doth order, that an injunction be [\*10] awarded to restrain the defendant, Thomas Kelly, from \*publishing or selling, in the name of Peter Nicholson, the book or work in the pleadings mentioned, called *The Practical Builder* or any parts or part, or numbers or number thereof; and also from employing the defendant, Peter Nicholson, from [in] writing any part of the letter-press, or designing any of the plates of the said book or work, called *The Practical Builder*, and that the defendant, Thomas Kelly, be also restrained from publishing or selling, in the name of Peter Nicholson, any part of the said book or work, called *The Practical Builder*, printed or engraved since the filing of the plaintiff's bill in this cause, which has been written or designed by the defendant, Peter Nicholson, until the hearing of this cause, or until the farther order of the court.”

Reg. Lib. A. 1823, f. 1921.[1]

[\*11]

\**BURR v. MASON.*

1824, 17th January.—*Transfer of stock.*

Where a bill is filed merely to obtain a transfer of stock, standing in the name of a trustee who is out of the jurisdiction of the court, the order must be made at the hearing of the cause, and cannot be obtained by petition.

THE bill was filed under the 36th Geo. 3, c. 90, s. 1, to have a sum of stock standing in the names of two trustees, (one of whom was out of the jurisdiction of the court,) transferred by the other trustee to the plaintiffs. After the an-

[1] This case appears again, in 1828, under the title of *Barfield v. Kelly*, 4 Russ. 355. This court,” says Sir John Leach, M. R., “ has no right to give a plaintiff a remedy for an alleged piracy, unless he can make out that he is entitled to the equitable interposition of this court by injunction; and in such case the court will also give him an account, that his remedy here may be complete. If this court do not interfere by injunction, then his remedy, as in the case of any other injury to his property, must be at law.” “ Although the plaintiff failed upon the answer of the defendant, to obtain an injunction, he is at liberty to claim it at the hearing.” Yet, as the portion of the plaintiff's work, alleged to be pirated, was very inconsiderable, and as a number of years had elapsed since the first publication of the defendant's work, which had gone through three editions, the bill was dismissed with costs; *Bailey v. Taylor*, 1 Russ. & Mylne, 73; S. C. 1 Tamlyn, 295. See further, *Glassington v. Thwaites*, 1 Sim. & Stu. 124; *Brandreth v. Lance*, 8 Paige, 24; *Bell v. Locke*, Id. 75. An injunction was refused, in a clear case of piracy, merely on account of the delay, being six years and a half between the completion of the defendant's publication and the filing of the bill; *Lewis v. Chapman*, 3 Beav. 133. It has been a question whether the injunction should go to the whole of the defendant's work, or only to the part pirated. Lord Eldon felt the difficulty, but evaded the decision of it in the order he made in *Mawman v. Tegg*, 2 Russ. 385. In a recent case (1839) the subject is well considered by Lord Langdale, M. R., who made an order to restrain the defendant from printing, &c. any copy or copies of a book called, &c., containing any article or articles, passages or passage copied, taken or colorably altered from a book called, &c., published by the plaintiffs; *Lewis v. Fullarton*, 2 Beav. 6.

1894.—Taylor v. Shaw.

swer had been put in, but before the cause was heard, a petition was presented by the plaintiffs, praying to the same effect as the bill. That petition now came on to be heard.

Mr. K. Parker, in support of it, cited *Williams v. Bird*.(a)

The Vice-Chancellor said, that he could not make the decree in the cause upon a petition, but that the cause must be regularly set down for hearing.[1]

\*TAYLOR v. SHAW.

[\*12]

1894, 17th January, 1st and 19th March.—*Practice.—Pleading.*

After plea allowed to part of the bill, the plaintiff cannot amend his bill without a special order, to be obtained on notice of motion, stating the proposed amendments.

After plea of settled account allowed to part of the bill, motion to amend the bill, by stating facts which tended to show that there was no settled account, or that the plaintiff ought to be allowed to surcharge and falsify, was refused with costs; because the plaintiff could prove there was no settled account by taking issue on the plea, and might have amended with a view to surcharge and falsify before the plea was argued.

THE plaintiff and the defendant had entered into partnership in 1812, as army clothiers, and carried on business as partners for several years. The bill prayed that it might be declared that the partnership was dissolved, and that the accounts might be taken from the commencement of the partnership.

To this bill the defendant pleaded a settled account up to the 31st of December 1813, and answered the rest of the bill.

The plea upon argument was allowed.

The plaintiff, after the plea was allowed, endeavored to obtain an order to amend his bill upon a motion of course; but the registrar refused to draw up the order on a motion without notice, as being contrary to the practice of the court.(b)

The plaintiff then moved, upon a general notice, that he might have leave to amend his bill. The motion was supported by an affidavit of the plaintiff, stating that the settled account was erroneous in various particulars; and generally that he could introduce divers charges whereby he could falsify and displace the alleged stated account.

1st March.—The motion having come on upon this notice, the Vice-Chancellor required that the plaintiff should serve a new notice of motion, in which he should state the particulars of the amendments which he proposed to introduce into the bill. [\*13]

A notice of motion was accordingly served, stating the particulars of the proposed amendments. These were, in substance, facts tending to show that the

(a) 1 V. & B. 3.

(b) See *Carlton v. D'Estrange*, 1 Turner, 23.

[1] Vide *Marriott v. White and others*, 1 Sim. & Stu. 17, and note, *ibid*.



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 1824.—Taylor v. Shaw.
 

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account pleaded was not to be taken as a settled account ; that the defendant had deceived the plaintiff, and that there were divers errors and omissions in the items of the pleaded account, which the plaintiff sought to surcharge and falsify.

The defendant filed an affidavit, which in substance denied the errors and the facts sought to be stated by the plaintiff.

12th March.—Mr. *Rose*, for the motion:

Mr. *Horne*, and Mr. *Keene*, for the defendant, *contra*.

The VICE-CHANCELLOR :—The first question that occurred in this case was, whether, after a plea allowed to a part of the bill only, the plaintiff could obtain the common order to amend, as of course, on the ground that, as to the part of the bill not covered by the plea, the plaintiff was now in the same situation as if his bill had originally extended to that part alone, and was therefore entitled to amend, as of course.

It appears, however, not to be the practice to permit the plaintiff to obtain, in such a case, an order to amend, as of course ; and the reason obviously is that, under a general order to amend, the plaintiff might make a new case, which would altogether avoid the plea, and leave the defendant no benefit or [\*14] protection \*from it. The plaintiff has therefore been required to state, in his notice of motion, the particulars of the amendments which he desires to make. These proposed amendments may accurately be described as being in their nature either amendments introducing matter to show that in fact the plea is not true, and that there was no settled account up to the 31st December 1813 ; or amendments to show that if the plea be true, and if there was a settled account up to the 31st of December 1813, the plaintiff ought to be permitted to surcharge and falsify that account.

If the plaintiff means to disprove the plea, he must go to issue upon it ; and it would be useless to permit him to introduce new matter tending to that effect in his bill ; because the plea protects the defendant from answering it ; and, if the plaintiff means now to admit the truth of the plea, and to make a new case which should avoid its effect and be consistent with it, he comes too late for that purpose.

If the plaintiff had thought fit thus to change the nature of his case before the argument of the plea, he was at full liberty to do so, upon payment of twenty shillings costs ; but having made his election to rest his case upon the invalidity of the plea, it would be unjust to the defendant to permit him now to shift his ground in the present suit.

The application now made must therefore be dismissed, and, failing wholly, must be dismissed with costs.

1824.—Ormond v. Kynnersley.

\*MARQUESS OF ORMOND v. KYNNERSLEY.

[\*15]

1821, 20th February; 20th March.—*Award.*

The court will enforce an award made under an order of reference, by consent in a cause; and it makes no difference that it is a part of the order that the parties should execute arbitration bonds. It is not necessary to make such an award a rule of court.

THE bill in this case was filed by Lord Ormond against the executors of Clement Kynnersley, who had been tenant for life, unimpeachable of waste, of the estates in question, in order to charge his personal estate with the value of ornamental timber alleged to have been cut by him.

By the decree made at the hearing of the cause, it was referred to the master to take an account of the ornamental timber so cut, and it was directed that the value should be paid out of Mr. Kynnersley's personal estate; and costs and further directions were reserved.

After the decree, Lord Ormond died, and the suit was revived by his executors, and an order by consent was made upon the petition of those executors, that the master, instead of proceeding under the decree, should approve of a proper person or persons to be an arbitrator or arbitrators of the matters in difference in the cause, as also of all other matters of difference between the parties; and the master was to settle and approve of proper bonds to be entered into by the parties for that purpose.

The master did accordingly approve of an arbitrator, and settle arbitration bonds, which were executed by all parties. By these bonds the arbitrator was to make his award on or before the 1st of February 1823; but on the 3d of February 1823, an order was made by consent, on the petition of the defendant, the executor of Clement Kynnersley, that the time for making the award should be extended to the 1st of July 1823; and by \*an- [\*16] other order by consent, on the 13th of June 1823, the time was further extended to the 28th of November 1823; such last-mentioned order being also made upon the petition of the defendant, the executor of Clement Kynnersley. The arbitrator having awarded that a certain sum should be paid, at a time stated, by the defendant to the plaintiffs, a motion was now made on the part of the plaintiffs, that the award if necessary might be made a rule of court, or, if not necessary, then that the defendant might be ordered to pay the sum awarded.

Sir G. F. Hampson, for the motion.

Mr. Pepys, for the defendant, opposed the motion.

The register (Mr. Walker) being consulted by the court as to the necessity of having the award made a rule of court, seemed to consider that it ought to be so, as the court would not otherwise have any record of it.

The motion was ordered to stand over, that search might be made for authorities.

1824.—Ormond v. Kynnersley.

20th March.—Sir *G. F. Hampson*, on this day stated that there was one case in which the court had enforced an award made on an order taken by consent for a reference, without the award being made a rule of court. *Sibley v. Saffell*, 18th of March 1812, and 7th of March 1814, before Lord Eldon. He also mentioned *Hide v. Petit*.(a)

Mr. *Pepys* objected that the court would not enforce this award, because it being a part of the order of reference that the parties should execute [\*17] \*arbitration bonds, it was plainly their intention to rely upon the bonds as their security for the performance of the award, and that they had therefore excluded the jurisdiction of the court to enforce the award.

The case stood over for judgment.

The VICE-CHANCELLOR :—As to the first point, the case of *Sibley v. Saffell* is an express authority that the court will enforce an award made by virtue of an order of the court, without requiring that the award should first be made a rule of the court. In the case of a reference under the statute, it is not the award, but the submission which is made a rule of court. It is not denied that, generally speaking, this court will enforce an award which is the result of an order of reference made by the court. But it is said, for the defendant, that such orders, being matters of agreement and consent, the parties may agree, if they think fit, to exclude the jurisdiction of the court ; and that here there is plain evidence of such agreement by the condition to execute arbitration bonds, which would be wholly unnecessary if the parties relied upon the authority of the court. There is a circumstance here, to which I shall presently refer, which does not make it necessary for the court to determine this point ; but it does appear to me extremely difficult to maintain that the additional security of arbitration bonds, which will reach the property of the parties, necessarily implies an agreement to exclude the jurisdiction of the court, which primarily gives only a personal remedy. There the time limited in the arbitration bonds for making the award was the first of February 1823, and there was no provision in the bond for the arbitrator to enlarge the [\*18] \*time ; and, the time being suffered to expire without an award, the bonds became *functi officio*. On the 3d of February 1823, the defendant, by petition and consent, obtains an order of this court to enlarge the time for making the award to the 1st of July 1823 ; and, afterwards, another order, by like petition and consent, for a further enlargement of the time to the 28th of November 1823, and the award which bears date on the 10th day of November 1823, is therefore to be considered as made by the sole authority of the court, and not by the force of the bonds. Take the order, therefore, for payment according to the award.

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1824.—Baldwin v. Lawrence.

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## BALDWIN V. LAWRENCE.

1824, 26th February.—*Partnership.—Parties.*

Bill by three of the partners in a numerous trading company claiming certain privileges under the articles of copartnership, against the members of the committee for managing the commercial concerns of the company, dismissed, because it was not filed by the plaintiffs on behalf of themselves and the other partners not members of the committee.

The court will not bind all the partners in a trading company, as to the construction of the articles of partnership, upon a point of general interest, in a suit by some of the partners against a committee for the management of the commercial concerns, not otherwise authorized to represent the partnership.

IN 1804, several persons residing in and near Birmingham agreed to form a company or copartnership for the purpose of supplying themselves with copper. For effectuating this purpose, they executed certain articles of partnership, dated the 1st of February, by which, after reciting that the article of copper had become of increasing importance to the town of Birmingham, and having opened to it fresh sources of trade and manufacture unknown prior to the establishment of any copper smelting company there, and the increased demand for the article having rendered the supply to the trade of the town both irregular and precarious, insomuch that it had of late been subjected to great disappointment, injury and loss, and the parties thereto being desirous of removing, as far as in their power, all such inconveniences, and of contributing \*towards a due and regular supply of copper to the town [\*19] of Birmingham and its neighborhood, and of promoting and extending their general trade and consequent prosperity, each of the persons whose names were thereunder written and seals affixed mutually covenanted with the others, that the parties thereto should be co-partners in the trade and business of purchasing copper, and other metals and ores, and of smelting the same; and have power to manufacture the metals so bought or smelted into such forms and states as might be found best adapted to the trade, interest and advantage of the co-partnership; and that the trade should commence from the 17th of October then last, and be carried on under the firm of The Crown Copper Company; and upon a capital or joint stock not exceeding 100,000*l.* and that the same should be divided into one thousand shares, of 100*l.* each; and that no partner should hold more than twenty such shares, unless the same should come to him by marriage, marriage-settlement, bequest or succession: and also that proper buildings, works and conveniences should be bought or erected, and the joint trade carried on in such places as the committee for the time being, to be appointed as was thereafter mentioned, should deem proper; and also that the committee should have power to purchase, rent or contract for any lands containing coals, or for the erecting works, engines, mills and other buildings, or for the making of wharfs or quays, or to purchase, rent or contract for any coal-mines or ores; and to convey, assign and set over such lands, and dispose of the coals, minerals or ores to be obtained there-

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from, in such manner as should appear to the committee most likely to conduce to the benefit of the copartnership : and also to provide such vessels [\*20] \*as might be deemed necessary for the use of the co-partnership ; and to export coals or other commodities, and to import ores, minerals or other commodities, in such ships or vessels as from time to time should be deemed necessary for the benefit of the copartnership : and also that each of the parties, for each share he should possess in the joint trade, should, every year during the copartnership, take from the co-partnership, at the current price and time of credit to be affixed by the committee, so much copper, not exceeding one ton, or of other metals, the amount whereof should not exceed the value of one ton of copper at that time, as the committee for the time being should deem proper ; and that, for the managing the partnership concerns, a committee of twenty-one of the parties thereto, (no one of them having less than four shares) should be chosen by the parties at large in manner therein mentioned ; and that any five committee-men, when regularly met, should be competent to act as a committee, and that the major part of the committee for the time being assembled should have power to bind the whole, and that the committee should appoint and remove the clerks, agents and servants of the copartnership, (except the treasurer and banker) and manage the concerns of the copartnership, and have the entire power of buying in and selling out all the articles in which the partnership should deal, and should see that due entries were made by the clerks in the partnership books, of all their receipts and payments, and dealings and transactions on account of the copartnership ; and that the committee should meet once a month at the least, when the treasurer should produce all accounts relative to the concern for the inspection [\*21] of the committee, who should \*at the same time examine the clerk's books and accounts ; and that a person appointed by the committee should sign them ; and that it should be lawful for the committee to borrow upon the credit of the joint trade any sum not exceeding 40*l.* on each share, whenever it should appear to them that such moneys could be employed by them in doing the acts which they were thereby authorized to do for the benefit of the co-partnership ; and that each of the party should pay his share of such sums of money not exceeding 100*l.* for the whole upon each share he should hold in the joint trade, and that, when calls should have been made to the amount of 40*l.* on each share in the copartnership, or money should have been borrowed to that amount by the committee, the committee for the time being should call a general meeting of the partners, when the whole state of the affairs belonging to the copartnership should be laid before the meeting ; and, if any of the parties thereto should wish to decline having any further concern in the joint trade, it should be lawful for him, within one month after such meeting, to withdraw his name therefrom, on executing a release of his or her share therein, and paying a proportionate share of the debt or debts contracted by the copartnership, which the cash in hand and effects belong-

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ing to the co-partnership, should not be sufficient to pay ; and also that, on or before the last Wednesday in June in every year, or oftener, if the committee should see fitting and necessary, or one-fourth in value of the holders of shares in the copartnership should desire it, a general meeting of the partners should be held, and the state of the affairs of the partnership should be laid before them by the committee, and the sense or opinion of the general meeting should be taken upon the same, and the resolutions and determinations of the major part of them thereupon should be final and conclusive ; \*and that, [\*22] at such general meetings, the accounts of the partnership should be laid before them for their examination and allowance ; and that, at such meetings, it should be determined what dividends should be made upon the profits of the joint stock and trade ; and that all bills, notes, checks and receipts on behalf of the partnership, should be drawn and signed by the treasurer of the partnership ; but if no treasurer should be appointed, then by three or more of the committee ; and that no individual, merely as a partner, without an appointment in pursuance of the deed, should intermeddle with the cash or effects of the partnership ; and that no partner should sell any share or interest in the joint trade to any person, unless the person to whom the same should be sold should enter into such covenants with the partners for the time being in the joint trade, or their committee, for the performance of all the covenants, clauses and things therein contained, and every alteration and addition then made or to be made therein or thereto, by virtue of the power therein contained, in the same manner as the person selling the same ought to do or have done, and as the person to whom the same should be so sold ought to have done in case he had originally been a partner in the joint trade, and had executed the articles, as, by the partners for the time being, or their committee, should be lawfully required ; and that, in case of the death or insolvency of any of the partners, his legal representative or assignee should be considered a partner in the joint trade, and should hold and dispose of the share of such person, subject to the terms, covenants and conditions of the articles ; and also that it should be lawful for three parts in four of the whole partners in value in the joint trade, at any public meeting, to dissolve the joint trade or copartnership ; and also that, if at any time \*during the continuance of the copartnership, [\*23] any question should arise between any of the partners and the rest of the company collectively concerning the joint concern or any therein contained, the same should be referred to two indifferent persons, one to be elected by the committee, and the other by the party with whom such question should arise, within one month after the same should so arise ; and, in case such two persons could not agree within one month after such reference, then the same should be determined by an indifferent person, to be chosen by the two first referees, who should determine the same within twenty days next after he should be appointed ; and whatever order, award or determination the said

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referees, or the umpire, should make, each of the parties covenanted to perform and keep without any further suit or trouble whatsoever.

The bill was filed by three of the partners against the members of the committee; and, after setting forth some of the provisions of the articles of copartnership, it stated that the number of the other partners was very large, but what was their number, or who they were by name, the plaintiffs were unable to state, because the articles of copartnership were in the possession of the defendants, who refused to permit them to have access thereto: that no treasurer had ever been appointed to the company, and that there was no person or officer appointed by the articles to sue or be sued in respect of the concerns of the company: that the defendants represented the copartnership, and were competent to protect its rights and interests. The bill prayed, that the plaintiffs might be declared to be entitled to the inspection, at all seasonable times, of all the deeds, books, accounts, writings and documents belonging to the [\*24] company; and that they might be permitted to \*inspect the same at all seasonable times, and to take extracts therefrom.

The defendants, by their answer, admitted that the articles were in their possession; that no treasurer had ever been appointed; and that there was not any person or officer appointed by the articles to sue or be sued in respect of the concerns of the company; and that the company consisted of one hundred and ten persons: they said that they had been induced to believe that the plaintiffs and the other partners, who were not members of the committee, were entitled, at the times when general meetings of the partners were held, and at no other times, to have access to and the inspection of such state only of the partnership affairs, and the accounts and documents of the partnership, which by the articles were directed to be laid before the partners at their general meetings: and that they had refused the plaintiffs access to those books for the purpose that the committee might not be impeded in managing the copartnership concerns by the interruption of a numerous body of individual proprietors using such access; and also for the purpose of preventing improper disclosures to other establishments of the like description, or to traders in or manufacturers of the like wares as those used or manufactured by the company, of the confidential affairs of the concern, to its prejudice; and that the committee were the more induced to do so, because the plaintiffs were, at the time of their application to inspect the books and papers of the concern, large proprietors in the Rose Copper Company, which was formed for carrying on the like business, and for the like purposes as the Crown Copper Company, and a rival to the same: that, if they were required by the order of the court to permit the plain- [\*25] tiffs to inspect the deeds, \*books, papers and writings belonging to the copartnership, they might, when so required, have ceased to be upon the committee, and to have the custody of those documents, and, consequently, be unable to obey that order; wherefore they submitted that all the partners ought to have been made parties to the suit, and they claimed the same benefit of that objection as if they had taken it by way of demurrer or plea; and they

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then mentioned the names of the other partners, to enable the plaintiffs to make them parties to the suit.

\**Mr. Hart, and Mr. Farrer, for the plaintiffs* :—The power assumed by these defendants of preventing the partners from inspecting the partnership accounts, is unreasonable and inconsistent with several of the provisions of the articles of copartnership: for, suppose a partner has it in contemplation to avail himself of the privilege given him by these articles of withdrawing from the partnership, is he to rely implicitly upon the account which the committee may choose to give him, and, without further information on the subject, to decide whether he will continue in the trade, or give up all that he has embarked in it? Is a partner to be prevented from knowing how many bills of exchange have been signed by the committee, to which he is liable? The clause which enables a partner to sell his share, can never be acted upon, if he is to be kept in that state of ignorance which this committee contend for; for who will enter into any contract for the purchase of the share when he can obtain no information as to the subject of the purchase? There is not a word in the articles from which it can be inferred that it was intended that the partnership accounts should be kept by the committee. If they were to be entrusted to any person, it was to the treasurer. The committee are invested with \*powers inconsistent with [\*26] the keeping of the accounts; and it was clearly the intention of the parties to these articles, to keep the transacting of the business of the partnership separate from the keeping of the accounts.

*Mr. Heald, and Mr. Gardner, for the defendants.*

The Vice-Chancellor intimated an opinion, that the plaintiffs, according to the true construction of the partnership articles, were not entitled to the relief prayed. But he held that the court could not bind all the partners as to the construction of the articles, upon a point of general interest, in a suit in which three only of the partners were plaintiffs, and the committee for management of the commercial concerns, who were not authorized otherwise to represent the partnership, were the only defendants: and he dismissed the bill. He said that the question would have been different if the plaintiffs had filed this bill on behalf of themselves and all other the shareholders, not members of the committee, praying for the inspection of books in the custody or power of the committee.[1]

He distinguished this from that of an individual not being a partner, but claiming against a numerous partnership or club, and who might file a bill against a few of the partners or members only.(a)

(a) *Cockburn v. Thompson*, 16 Ves. 221; *Meux v. Maltby*, 2 Swanst. 277; *Weale v. West Middlesex Waterworks Company*, 1 J. & W. 358; and *Weld v. Bonham*, post, 91.

[1] Where it appears upon the face of the bill that there will be deficiency in the fund in question, and that there are other creditors or legatees who are entitled to a rateable distribution with the plaintiff, and who have a common interest with him, such creditors or legatees should be made



1824.—Rowlinson v. Hallifax.

[\*27]

## \*ROWLINSON v. HALLIFAX.(a)

1824, March 1st.—*Conduct of a suit.*

The conduct of the cause given, on motion, to one of two co-plaintiffs, on its appearing that the other had no interest in the matters in question.

THE object of this suit was to recover part of the estate of William Hyde, deceased, which, under his will, had become vested in his sister, Jane Hyde, also deceased, who, by her will, gave all her property to Sarah Rowlinson, and appointed David Rowlinson her executor. The bill was filed by the plaintiff John Rowlinson, alone, stating himself to be executor of Daniel Rowlinson, and consequently the personal representative of Jane Hyde; but, on the hearing, it appeared that the will of Jane Hyde had not been proved in the proper ecclesiastical court, and the cause was ordered to stand over. Letters of administration of the estate of Jane Hyde were afterwards granted to Sarah Rowlinson, and the bill was amended by joining her as a co-plaintiff. The cause continued to be conducted by the solicitors of John Rowlinson, and a decree for an account and inquiries was made.

Mr. *Horne*, and Mr. *Jacob*, on the part of the plaintiff, Sarah Rowlinson now moved that the solicitors might deliver to her the papers in the cause, and that she might be at liberty to prosecute the suit.

Mr. *Spence* on the other side.

[\*28]

The Vice-Chancellor observed, that if he had been \*aware, at the time when the cause was first heard, that John Rowlinson had no interest in the matters in question, he should have dismissed the bill, instead of allowing it to be amended; and he made the order as prayed, upon the plaintiff, Sarah Rowlinson, paying the solicitors the costs due to them, as between solicitor and client.

(a) *Ex relations*, Mr. *Jacob*.

parties to the bill, or the suit should be brought by the plaintiff in behalf of himself, and all others standing in a similar situation; and it should be so stated in the bill. *Egbert v. Wood*, 3 Paige, 517. *Fish v. Howland*, 1 Paige, 20. *Brown v. Ricketts*, 3 Johns. Ch. Rep. 553. But where the bill is for the residue, all the residuary legatees must be made parties. *Brown v. Ricketts. ubi supra*. A subscriber to a joint stock corporation, created by the legislature, who, complains of an inequitable distribution of the stock, and who is seeking to reach stock which has been improperly assigned or apportioned to others, should file his bill in behalf of himself, and of all other subscribers standing in the same situation. *Walker v. Devereaux and others*, 4 Paige, 299. An order made at the hearing of a cause, and giving the plaintiffs leave to amend, for the purpose of adding parties, or showing why they were unable to bring all proper parties before the court, is sufficiently complied with, by an amendment, stating that the plaintiffs sue on behalf of themselves and all persons, (other than the defendants,) who fill a particular character, and alleging that the persons filling that character are so numerous, that if they were individually made parties, the suit could not be effectually prosecuted. *Milligan v. Mitchell*, 1 Mylne & Craig, 511. S. C. 3 Mylne & Craig, 72. See further *Attorney General v. Heeler*, post, 76. *Weld v. Bonham*, post, 91. *Douglas v. Horsfall*, post, 184. *Handford v. Storie*, post, 196. *Gray v. Chaplin*, post, 267, 272. and note, *ibid*.

1824.—Heaphy v. Hill.

Reg. Lib. 1823, B. f. 639.

"This court doth order, that the plaintiff, Sarah Rowlinson, be at liberty to carry on and to prosecute this suit;" the order then directs the costs of the solicitors, who had acted for the plaintiff J. Rowlinson to be taxed, and upon payment, that they should deliver up, on oath, to Sarah Rowlinson, all papers relating to the cause; and it reserves the question of the costs of the motion, as between the plaintiffs, Sarah Rowlinson and John Rowlinson.

\*HEAPHY v. HILL.

[\*29]

1824, 19th March.—*Specific performance.*

Bill by a lessee, for the specific performance of an agreement for a lease, dismissed, because it was not filed until more than two years after the defendant had given notice to the plaintiff of his intention not to perform the contract, on account of the latter not having fulfilled it on his part.

On the 9th September 1819 the plaintiff agreed to let to the defendant a house and garden, for seven, fourteen or twenty-one years, at the option of the latter, for a premium of fifty guineas, and an annual rent of eighty guineas; to make certain alterations and improvements in the house and garden at his own expense; to procure permission, from the ground landlord, for the defendant to build a coach-house and stable on the premises; and to complete the alterations and improvements, and deliver possession to the defendant, on or before the 29th of that month.

The alterations and improvements not being finished, nor the permission obtained, by the time agreed upon, the defendant, on the 8th of October 1819, informed the plaintiff, by letter, that, if the alterations and improvements were not completed by the 14th of that month, he should give up all idea of taking the house, and look out for one elsewhere. And the plaintiff having informed the defendant that the lease was at his house ready for signature, and requested the defendant to name a time for executing it, the latter refused to execute it until the agreement had been fulfilled on the plaintiff's part.

The bill was filed on the 1st of September 1821. The defendant, in his answer, said that, since he had refused to execute the lease as before mentioned, a period of nearly two years had elapsed, during all which \*time the plaintiff had retained possession of the house, and had acted [\*30] as owner of it. And he submitted that the plaintiff had abandoned the agreement and acquiesced in the defendant's refusal.

By the decree, the master was directed to inquire and state whether any thing, and what, had passed between the parties, or any person on their behalf, relating to the subject of the agreement, after the letter of the 8th of October 1819.

It appeared by the master's report, that nothing passed between the parties relating to the matter in question, after the 9th of November 1819, until the

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 1824.—*Fitch v. Chapman.*


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17th of August 1821, when the plaintiff's solicitor wrote to the defendant's solicitor, requesting to know whether the latter would appear to the bill.

The cause now came on for further directions.

Mr. *Sugden*, and Mr. *Treslove*, for the plaintiff.

Mr. *Heald*, and Mr. *Sidebottom*, for the defendant.

The VICE-CHANCELLOR :—As this bill was not filed for more than two years after the treaty had been broken off and the defendant had refused to perform the contract, and as the only reason assigned for the delay is, that the plaintiff's attorney had mislaid the papers relating to the transaction, I shall dismiss the bill, but without costs.[1]

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[\*31]

\*FITCH v. CHAPMAN.

1824, 28th April.—*Pleading.*

Plea by husband and wife, intituled as a joint and several plea; held, that the word "several" was mere surplusage, and did not vitiate the plea.

This was a bill of foreclosure against a husband and his wife.

The defendants put in a plea of usury, and intituled it as a joint and several plea. The plea now came on to be argued.

Mr. *Horne*, and Mr. *Turner*, for the bill, insisted that the plea was irregular on account of its title; because, as the wife joined with the husband in the plea, it could not in any sense be considered as a several plea.

Mr. *Wray*, for the plea.

The Vice-Chancellor considered the term "several" as meaning nothing; and that, being mere surplusage, it did not vitiate the plea.

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[\*32]

\*CLAY v. ST. JOHN.

1824, 28th April.—*Pension.*

The purchaser of a pension granted by his late majesty, during pleasure, is not entitled to a pension granted by the present king to the same person and of the same amount, under a new warrant reciting the grant made by his late majesty which had ceased by the demise of the crown, though the motive for granting both pensions was the same.

THE plaintiff filed this bill to obtain payment of a pension granted by his

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[1] Vide *Watson v. Reid*, 1 Russ. & Mylne, 236. Where the time of performance has been fairly limited by a notice stating that within such a period that which is required must be done, or others wise the contract will be treated as at an end, the court has very frequently supported that proceeding; and bill having been afterwards filed for the specific performance of the contract, the court has dismissed them with costs; *Taylor v. Brown*, 2 Beav. 180. See further, *Garrett v. Earl of Besborough*, 2 Dru. & W. 441.

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1824.—Clay v. St. John.

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present majesty to the defendant, in continuation of a previous pension of the same amount granted to him by the late king, and purchased by the plaintiff in the year 1808.

The bill set forth a warrant of the late king, under his royal sign manual, dated the 12th of August, 1780, by which his late majesty declared his royal will and pleasure to be, and, thereby directed that an annual pension of 131*l.* should be paid by the commissioners of the treasury unto the honorable Mary St. John, the widow of Henry St. John, a captain in his majesty's navy, to commence from the 5th of April, 1780, and to continue payable during his majesty's pleasure, and, in case of her decease, to be in like manner paid to Henry St. John, (the defendant,) the son of Captain St. John.

In 1873, Mrs. St. John died. In March, 1807, a commission of bankrupt was awarded against the defendant, Henry St. John. The assignees under that commission caused this pension to be put up for sale by public auction, and described it in the particulars of sale as "a pension from government during the life of Henry St. John, (the defendant,) then aged thirty-eight." The plaintiff became the purchaser at that sale for the sum of 381*l.* An assignment was thereupon executed by the defendant, St. John, as well as by the assignees, whereby the pension of 131*l.* so granted by his late majesty and all arrears and growing payments thereof, and all powers and authorities for recovering the same, \*and all right, title, interest, &c. of [\*33] the defendant St. John, and his assignees, to the pension of 131*l.* so granted, were assigned to the plaintiff, his executors, administrators and assigns. The deed contained a covenant by the defendant St. John, and his assignees, in the usual terms for the better assigning and assuring the premises to the plaintiff, his executors, administrators and assigns, "and for more effectually enabling him or them to recover and receive the said annual pension or sum."

The defendant St. John, some time before the demise of his late majesty, obtained his certificate under the commission of bankrupt; and the plaintiff, up to the demise of his late majesty, duly received the pension under the assignment.

On the 1st of July 1820, his present majesty granted a warrant under his sign manual, in the following terms:

"George, R.—Whereas our late royal father, of happy and glorious memory, was graciously pleased to authorize and direct the late paymaster of pensions to pay unto Henry St. John, during his royal pleasure, an annuity or yearly pension of 131*l.* and which said annuity was, in pursuance of an act passed in the twenty-second year of his late majesty's reign, transferred to our exchequer, and payable out of his civil list revenues; and whereas the said annuity or yearly pension hath ceased by reason of the demise of our said late royal father, and we are graciously pleased to give and grant unto the said Henry St. John an annuity or yearly pension to the like amount, our will and pleasure is, that, by virtue of our general letters of privy seal bearing date the 2d day of February 1820, you do issue \*and pay, or cause to [\*34]

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 1824.—Clay v. St. John.
 

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be issued and paid, out of any our treasure or revenue in the receipt of the exchequer applicable to the uses of our civil government, unto the said Henry St. John, or to his assigns, the said annuity or yearly pension of 181*l*. without account, to commence from the 29th day of January 1820, the day of our accession, and to be computed, payable and paid, by the day, from such day of commencement thereof, to and for the 5th day of April 1820, and from thenceforth to be paid quarterly or otherwise, as the same shall become due, and to continue during our pleasure: And for so doing this shall be your warrant. Given at our court at Carlton House, this 1st day of July 1820, in the first year of our reign.

By his majesty's command,

N. VANSITTART,  
G. C. H. SOMERSET,  
E. A. M'NAGHTON.

To the commissioners of our treasury."

The officers of the exchequer refused to pay the pension to the plaintiff under this new warrant, unless he received from the defendant St. John a power of attorney, or other proper authority; and would not recognize the assignment of 1808 as a sufficient authority for payment to the plaintiff under the new warrant.

After stating these facts, and also that an agent of the defendant St. John, (who was made a co-defendant in this suit,) had, under an authority from St. John, who was residing abroad, received the pension under the new warrant and threatened to remit it to St. John, the bill charged that the pension under the new warrant was not a new pension, or different or distinct from the [\*35] pension granted by his late majesty, but a continuance thereof, and that the last warrant proceeded and was grounded upon, and had reference to, the grant and warrant of his late majesty, and, but for the same, would not have been granted or issued; and that it has always been customary, in point of form, on a demise of the crown, to issue fresh warrants under the royal sign manual for the continuance and future payment of all pensions subsisting at the time of such demise; and that the fact of the last warrant making the pension payable to the defendant St. John and his assigns, although the grant and warrant of the late king made it payable to the defendant St. John alone, was evidence of the plaintiff's title.

The bill prayed that it might be declared that the pension under the warrant from his present majesty was a continuance of the former pension, and that the plaintiff might be declared entitled to it as a purchaser; that the defendant St. John might be decreed specifically to perform his covenants contained in the indenture of assignment, and to execute a proper instrument to entitle the plaintiff to receive all arrears and future payments of the pension from the accession of his present majesty, and for an account of the payments received by either of the defendants, and for an injunction to restrain them from receiving any future payments.

1824.—*Stanhope v. Keir.*

To this bill the defendants put in a general demurrer for want of equity. The demurrer now came on to be argued.

Mr. *Knight*, for the bill.

\*Mr. *Horne*, and Mr. *Palmer*, for the demurrer, insisted, that the [\*36] circumstance of both the pensions being granted only during the royal pleasure, was decisive against the plaintiff's claim.

The VICE-CHANCELLOR :—The plaintiff is the purchaser of the pension granted by the late king during his majesty's pleasure. This pension necessarily determined by the demise of the late king. The same motive of bounty which induced the grant from the late king to the defendant has probably influenced the grant of his present majesty : but it is not for that reason the same pension. A person entitled to a pension during pleasure may, if he pleases, sell, not only that pension, but any future pension granted in consideration of the same motive : but that is not the case here. This case is improperly confounded in principle with cases where a testator gives a leasehold interest to two or more persons successively. There all interest in the subject which the first taker acquires in consequence of the testator's gift, enures for the benefit of those in remainder. A purchaser of a pension is not a remainder-man.

Demurrer allowed.[1]

STANHOPE V. KEIR.

[\*37]

1824, 29th April.—*Appointment.*

Where a power was to be executed by a will, signed and published in the presence of, and attested by three witnesses ; held that a will concluding with this declaration : " this is my last will and testament," and expressed to be signed by the testatrix, in the presence of the three attesting witnesses, was not a good appointment, because the publication was not attested.

THIS was a bill filed by parties claiming to be entitled, under the limitations in a marriage settlement, to real and personal estate, in default of appointment.

Eugenia Stanhope, by the settlement on her marriage with the defendant John Keir, conveyed her real estates to the use of the defendant John Keir, for his life ; with remainder to the use of the issue of the marriage, as she should appoint ; and, for default of such issue, if she should survive the defendant John Keir, to the use of herself in fee : but if she should die in his lifetime : " to such uses, upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisoes and declarations, as the said Eugenia Stanhope should, notwithstanding her coverture, by her last will and testament in writing, or any codicil or codicils to the same, signed and published by her in the presence of, and attested by three or more credible witnesses, appoint ; and in default of such last-mentioned appointment, and so far

[1] Vide *Emerson's heirs v. Hall*, 13 Peters, 409.

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 1824.—*Stanhope v. Keir.*


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as any such appointment shall not extend, to the use of Charles Stanhope, (one of the plaintiffs,) his heirs and assigns for ever."

By the same settlement, she covenanted to transfer several sums of stock in the public funds, into the names of the trustees, upon trust to pay the dividends to the defendant John Keir for his life, and, after his decease, to pay the dividends to her for her life, and, after the death of the survivor, to [\*38] stand possessed of the \*stock in trust for the children of the marriage, as she should appoint; and, in case no child should become entitled under the trusts before expressed: "In trust for the said Eugenia Stanhope, (if she should survive the said John Keir,) her executors, administrators and assigns; but, if she should die in his lifetime, then in trust for such person or persons, for such intents and purposes, and subject to such powers, provisoes and declarations, as the said Eugenia Stanhope, by her last will and testament in writing, or any codicil or codicils thereto, to be signed and published by her in the presence of, and attested by two or more credible witnesses, should, notwithstanding her coverture, direct or appoint, give or bequeath the same;" and, for default thereof, in trust, as to one sum, for the plaintiff Charles Stanhope, his executors, administrators and assigns, and, as to the others in trust for the persons who should, at the death of Eugenia Stanhope, be the next of kin of her deceased mother.

The marriage took place soon after the date of the settlement. There was issue of the marriage only one child, who lived only for six months. On the 16th of May 1823, the wife herself died, having, on the 19th of November 1818, a few days after the marriage, made her will in the following words:

"Gravesend, November 19th, 1818.

"I, Eugenia Keir, formerly Eugenia Stanhope, hereby give and bequeath all that I do or shall possess in landed property and funded property, and my books, china, plate, linen and furniture, &c. to my husband John Keir, esquire, of the island of Madeira, for ever, and also my jewels, &c.: and this is my last will and testament, made and signed in the year of our Lord 1818, [\*39] on the \*19th day of November, at Gravesend, in the county of Kent.

(signed) EUGENIA KEIR, (L. s.)

In the presence of

C. MACDONALD LOCKHART.

THOMAS BENNETT.

ALEXANDER EDWARDS.

This was the only instrument executed by Mrs. Keir, in the nature of an appointment under the powers in the settlement.

The bill was filed against John Keir and the trustees of the settlement, praying to have it declared that the plaintiffs were entitled to the settled property, subject to the life estate of John Keir, upon the ground that the will was not duly attested according to the powers.

To this bill, the defendant John Keir pleaded the will. The plea set forth

1824.—Lord Selsey v. Rhoades.

the will and attestation *in hæc verba*, and averred that the will was duly signed and published by the testatrix, in the presence of and attested by the three credible witnesses above named; that the defendant had proved the will in the prerogative court, and had obtained letters of administration of the personal estate of his late wife, with the above will annexed; that his late wife was not, at any time during her coverture with him, seised, possessed or entitled of or to, nor had any disposing power over any real or personal estate whatever, except the real and personal estate comprised in the marriage settlement mentioned in the bill, and except certain articles of plate which belonged to her before her marriage, and which remained at her banker's in her name, and except her jewels and paraphernalia, but over which plate, jewels and paraphernalia, the defendant averred he was [\*40] advised she had no disposing power.

The plea now came on to be argued.

Mr. J. Martin for the bill, insisted that the appointment was not duly made by the will, and relied on *Moodie v. Reid*.(a)

Mr. Sugden, and Mr. Rolfe, for the plea, admitted that the power required that the witnesses should attest the signing and publication of the appointment; but insisted that the declaration with which the will concluded, was in effect a publication as well as a signing, and that the witnesses, by adding their names to this declaration, attested both facts.

The VICE-CHANCELLOR :—The argument for the defendant supposes the witnesses to be acquainted with the contents of the will. I cannot assume more from this attestation than that they saw Mrs. Keir sign the instrument.

Plea overruled.[1]

\*LORD SELSEY v. RHOADES. .

[\*41]

1824, 9th, 10th & 11th May.—*Principal and agent.*

Bill to set aside the lease of a farm granted to a steward by his employer, dismissed, with costs; although the lease was for a term longer than was usual on the estates, and was granted at the solicitation of the steward, on an agreement made, before the subsisting lease had expired, and at a rent lower than was offered to the steward on behalf of the occupying tenant; it appearing that the rent to be paid by the steward had been fixed by a surveyor named for that purpose by the employer, and on a valuation made in the manner usual with that surveyor; and the offer of a higher rent being known to the employer before he executed the lease.

(a) 1 Madd. 516; 7 Trunt. 355.

[1] A power over personal estate was required to be executed by a will signed and published in the presence of, and attested by two witnesses: the donee professed to execute the power by a will which was signed by her and she acknowledged her signature to the two witnesses, but did not sign it in their presence, and the witnesses at different times signed an attestation that the testatrix had signed and delivered the will in their presence: it was held that though delivery was equivalent to publication, the power was not well executed, *Simeon v. Simeon*, 4 Sim. 555. Vide *Ogle v. Ogle*, *Sausse & Scully*, 33.



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 1824.—*Lord Selsey v. Rhoades.*


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THIS was a bill to set aside, as fraudulent, a lease of a farm, which had been granted many years ago by James Lord Selsey, the grandfather of the plaintiff, to the defendant, who was his steward and confidential agent.

In the year 1801, James Lord Selsey appointed the defendant to be steward, agent and receiver of the rents of his estates in the counties of Surrey, Sussex, Berks and Kent, with an allowance of four per cent. on the clear annual rents and profits of woods, besides the usual fees as steward of manors. He continued to act as steward on these terms till the death of James Lord Selsey, in 1808; and from that time continued in the service of John Lord Selsey, till his lordship's death in 1816, in the same capacity, and on the same terms, except that his allowance was increased to five per cent.

The bill stated that, in the course of his services, the defendant became well acquainted with the value of the various farms on the estate; and that, availing himself of this knowledge, with a view to his own advantage or that of his son, he applied, in 1803, to James Lord Selsey, and his son, the Hon. John Peachey, afterwards John Lord Selsey, to grant him a lease of

[\*42] \*two farms, called Preston farm and Amberley farm: that it was considered inconsistent with his duties as steward and agent to grant him this lease: but that he was very importunate, and although he desisted from his application as to Preston farm, yet he persevered as to Amberley farm, and promised that, if a lease of it was granted to him, he would have a fair valuation made and an adequate rent set upon it previously to his taking it: that accordingly he caused the farm to be valued by Richard Eager, a surveyor, who fixed the rent at 400*l.* which the defendant represented to be a full and fair valuation, and that if he undertook to make repairs and pay taxes, the rent according to that valuation, ought to be 330*l.*: that upon this, an agreement was entered into, dated the 2d of April 1804, by which James Lord Selsey, and the Hon. John Peachey, agreed to grant to the defendant a lease of Amberley farm, for the term of twenty-one years from Michaelmas 1806: that at the time when this agreement was entered into, that farm was subject to a lease, granted by James Lord Selsey to William Holman which did not expire till Michaelmas 1806: that James Lord Selsey died in 1808; and, on the 4th January 1809, a lease to the defendant, for nineteen years from the Michaelmas preceding, was granted by John Lord Selsey, pursuant to the agreement.

The bill then charged the following circumstances as fraudulent in the transaction on the part of the defendant: that shortly before the expiration of the lease to William Holman, (who was then dead,) his widow or son, or his executors, offered a rent of 500*l.* to the defendant, as Lord Selsey's steward, provided the lease was renewed; but that the defendant refused this [\*43] offer, and did not communicate it to Lord Selsey: that the \*defendant obtained the agreement for a lease during the currency of Holman's lease, for the purpose of preventing competition, and to secure the farm, to himself at a low and inadequate rent: that a lease for a term of twenty-one

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 1824.—*Lord Selsey v. Rhoades*.
 

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years absolute was unusual upon Lord Selsey's estate, the leases of which were generally made determinable at the end of seven and fourteen years : and that the lease granted to Holman, the preceding tenant, was determinable at the end of seven and fourteen years : that Eager's valuation, according to which the rent paid by the defendant was fixed, was inaccurate as to the value of the rights of common and of the tithes attached to the farm : that neither James Lord Selsey, nor John Lord Selsey, were informed of the rights of common : that the defendant, at the time when the agreement to grant a lease to him was entered into, knew that an act of parliament, for the inclosure of the common lands in the parish of Amberley, was in contemplation, and expected and knew that the value of the farm would be greatly increased by that inclosure : that the plaintiff had the farm surveyed in 1820, and found that it contained four hundred acres more than was specified in Eager's valuation ; and that these four hundred acres were an allotment made under the inclosure act, in 1810, in lieu of the rights of common attached to the farm, but that these rights of common had been entirely omitted in Mr. Eager's valuation : that upon the survey in 1820, the farm was valued by Mr. Pinner, a surveyor, as worth 840*l.* per annum, at a fair rent : that, in a rental delivered by the defendant to the plaintiff in 1816, he represented Amberley farm to contain five hundred acres, although it did, in fact, contain, as defendant then knew from a plan in his possession, eight hundred acres. The bill also contained allegations that the \*defendant had used undue influence over James Lord Selsey and John Lord Selsey, by his having borrowed many sums of money for them, which he procured to be lent by his own private friends, who might have been induced, at his instance, to require payment of the sums lent by them at times when it might have distressed their lordships to procure money to pay them.

The prayer of the bill was, that the lease granted to the defendant might be declared fraudulent and void, and be delivered up to be cancelled ; and that it might be referred to one of the masters of the court to fix a fair occupation rent for the farm while in the defendant's possession ; and that he might be decreed to pay the difference between the rent to be fixed by the master, and that which he had paid under the lease.

The defendant, by his answer, stated that he was, in 1803, desirous of having a lease, on fair terms, of Preston farm and Amberley farm, for the purpose of establishing his son, who, from his state of health, was not fit for any other pursuit than farming : that the reason why James Lord Selsey and his son were averse to grant him a lease of both farms was, that they were afraid it might withdraw his attention from other pursuits, and might be misrepresented to his disadvantage ; but that they both agreed to grant a lease of Amberley farm to the defendant, the rent to be fixed by valuation of a surveyor ; and that James Lord Selsey directed the survey and valuation to be made by Mr. Eager : that the survey was accordingly made by Mr. Eager, who was not at the time aware that the defendant was to be the tenant : that, in

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[\*45] September 1804, William Borrer, one of the trustees and \*executors of Holman, the preceding tenant, (who had about a fortnight previously applied to the defendant for a renewal of the lease for Holman's widow and family, and was told he could not have it,) personally applied to James Lord Selsey for a renewal of the lease, and, upon being informed by his lordship that the farm was engaged, he offered to give a larger rent: that James Lord Selsey was surprised at this offer, and mentioned it to the defendant, who thereupon wished to have the farm re-valued, but that Lord Selsey declined having it re-valued, and expressed himself satisfied with Eager's valuation: that the defendant again pressed James Lord Selsey, by letter, dated 25th April 1805, to have the farm re-valued, or to see Mr. Eager; in reply to which James Lord Selsey wrote as follows:—"Both Mr. Eager and you may rest satisfied that I have no desire whatever to have recourse to any other opinion of his valuation of Amberley, being perfectly persuaded of the rectitude of it; and, in order to confirm that opinion, I would have you immediately engage him for Crowshall:"—That, in October 1806, the defendant having heard that James Lord Selsey wished him to give up the farm, he wrote to his lordship, mentioning that he had heard this, and offering to give it up, but that his lordship wrote a letter in reply, dated the 3d of October 1806, which concluded in these words:—"As to any vexation, or wish that you should now give it up, I have never had such an idea; and you may be assured that I do very sincerely wish you all the success in it that your own desires can lead you to hope, and your services deserve, from your's most truly, SELSEY."

The answer admitted that a lease for twenty-one years absolutely [\*46] was contrary to the usual mode of letting \*Amberley farm and other farms on the estate, though some of them were occasionally so let; and it also admitted that, at the time of the agreement for the lease, the defendant had reason to know, suspect or believe, that very valuable and extensive rights of common were attached to the farm, but that these rights were disputed; that Eager knew of those rights, and included them in his valuation; and that both James Lord Selsey, and John Lord Selsey, knew of those rights at the time of the agreement. The answer denied the charges of having or exercising undue influence over James Lord Selsey, or John Lord Selsey, by means of the way in which he borrowed money for them, or otherwise; and stated that they possessed so much money in the public funds, as to be enabled at any time, if they had been suddenly called upon, to pay off more than all they had borrowed.

Many witnesses were examined in this cause on both sides. Borrer, Dennett and Coppard, three of the trustees and executors of Holman, the former tenant, who were examined on behalf of the plaintiff, deposed that, at the time when they offered, by letter, to James Lord Selsey, a rent of 500*l.* a year for Amberley farm, they did not know who was to be the tenant; that the offer was made from a real desire to benefit Holman's family: and that, at a meeting of the trustees of Holman's will, in February 1806, it was resolved to offer

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even 600*l.* a year for the farm, in order to secure the benefit of it to Holman's family. Florance, a surveyor, examined also on behalf of the plaintiff, deposed that he was satisfied that Eager's valuation, as to the quantity of cultivated land on the farm, was correct; but that the rights of common appeared to him to have been erroneously omitted in that valuation. \*Hemming- [\*47] way, who was surveyor to the commissioners under the Amberley inclosure act, also a witness for the plaintiff, stated that, in 1812, he valued so much of Amberley farm as lay within the parish of Amberley, at 907*l.* 13*s.* 5*d.* a year, and was convinced it would then have let for that sum; and likewise stated his opinion as to several inaccuracies in Eager's valuation.

Eager, who was examined for the defendant, deposed that in the valuation he had used all the means usually adopted by him, and had done his best to fix a fair and proper rent for the farm, including the tithes and rights of common; that, accompanied by Foster, the bailiff employed on the farm, he viewed all the land which composed the farm, and all over which rights of common existed or were claimed: that his valuation was a fair and just valuation; and that he estimated and included in it the tithes. Emery, another surveyor examined on behalf of the defendant, deposed that the rights of common of Amberley farm, before the inclosure act, were disputed and were interfered with; and that the defendant had laid out above 1,500*l.* on repairs improvements and buildings on Amberley farm during the time it had been in his possession. Pinnix, another surveyor examined on the part of the defendant, and who had been employed in 1820 by the plaintiff, Lord Selsey, to survey Amberley farm, as mentioned in the bill, deposed that he had examined Eager's valuation and believed it to be correct; and that he would himself rather have taken the farm in 1820, according to the valuation which he then made of it, than have taken it in 1803, at the rent fixed by Eager.

Many other witnesses were examined on both sides; but their evidence, and various other passages in the \*pleadings, besides those [\*48] already mentioned, were so fully stated in the judgment of the vice-chancellor that it is unnecessary to set them forth here.

The cause now came on to be heard.

Mr. *Horne*, Mr. *Sugden* and Mr. *Blenman*, for the plaintiffs:—The title of the defendant must stand upon the adequacy of the rent and the fairness of the transaction, and not as proceeding from any act of bounty towards him. It is, therefore, for the defendant to show that he has obtained the lease fairly. *Harris v. Tremenhoe*(a) clearly establishes the principle, that in such a case it lies with the defendant to show that he has made as good a bargain for his employer as against himself, as a provident steward acting most advisedly would have made. A very important circumstance in this case is, that the valuation on which the rent was fixed is the valuation of a reversion. It

(a) 15 Vcs. 34.

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was made several years before the expiration of the then subsisting lease. The defendant, too, had not interposed any one to conduct the negotiation; nor did he attempt to negotiate with any one except James Lord Selsey and John Lord Selsey.

Mr. *Heald* and Mr. *Pepys*, for the defendant :—No case of fraud or misrepresentation has been made out against the defendant. The case, therefore, is reduced simply to that of a steward, who, being desirous of obtaining a lease from his employer, puts it into the hands of an experienced valuer, and makes his valuation the ground of his transaction with the [\*49] \*landlord. In this case, the valuer was named by the landlord himself, from the experience which he had of his skill in other cases. In the case of *Cane v. Lord Allen*(b) it was laid down that, where there is a purchase by an attorney from his client, the attorney must show that he has interposed somebody between himself and his employer, and that he has communicated all the knowledge which he himself possessed as to the value of the property. That was what the defendant, in this case, has done. Before the lease was granted, both James and John Lord Selsey were informed that the rent reserved pursuant to the valuation which had been made, was inadequate to the farm. Upon this they made inquiry, and the result of that inquiry was, that the lease was granted to the defendant. There never was a case in which there were stronger acts of confirmation, after circumstances had occurred to call the attention of James and of John Lord Selsey to consider the adequacy of the rent agreed to be paid by the defendant.

The VICE-CHANCELLOR :—In this case, it is necessary to explain clearly the principles upon which my judgment proceeds.

There is no rule of policy which prevents a steward from being a lessee under his employer. There is no rule of policy which prevents a steward from receiving from the bounty of his employer a beneficial lease. But where the transaction proceeds, not upon motives of bounty, but upon contract, there the steward is bound to make out that he gives the full consideration [\*50] which it would have been his duty as steward to obtain \*from a stranger; and, where the transaction is mixed with motives of bounty, there the steward is bound to make out that the employer was fully informed of every circumstance respecting the property which either was within the knowledge of the steward, or ought to have been within his knowledge, which could tend to demonstrate the value of the property and the precise measure and extent of the bounty of the employer.

These doctrines may be considered as comprised in the general maxim, that a steward dealing with his employer shall derive no advantage from his situation as steward. The employer may, if he pleases, treat with his steward preferably to any other person; and this preference is a bounty. But the

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steward cannot take advantage of this preference, unless he fully imparts to his employer all the circumstances of existing competition.

It is said, in this case, that the defendant obtained an agreement for the lease in question three years before the expiration of the subsisting lease, with a view to prevent a competition which he expected from the occupying tenant. If this were established in evidence, there would be an end of the case. It appears, on the contrary, by parts of the answer of the defendant which have been read by the plaintiff, that, in or about March 1803, Mr. Borrer applied to the defendant for a new lease of the farm, for the widow or son of Thomas Holman, who was the brother of the original lessee, William Holman; and that the defendant observed that he thought Lord Selsey would not grant a new lease without a valuation; and that Borrer answered that a valuation was not necessary, for that the farm was worth no more than the present rent; and that the defendant replied, whoever took the farm must [\*51] take it upon a new valuation; and that the defendant afterwards stated to Lord Selsey what had passed between him and Mr. Borrer; and inasmuch as the original lessee, William Holman, had died without leaving any family, this application by Borrer suggested to him, the defendant, that there would be no impropriety in treating himself for this farm; and therefore, at the same time when he stated to Lord Selsey what had passed with Borrer, he applied to Lord Selsey to have the preference of the farm for himself, to which Lord Selsey consented.

It is said further, by the plaintiff, that, between the time of the defendant's agreement for the lease and his actual possession of the farm under that agreement, a formal offer had been made to the defendant, by the executors of Thomas Holman, to give the increased rent of 500*l.* and that this offer ought to have been, and was not communicated to Lord Selsey.

If this proposition were true in fact, it might be questionable in principle; but the facts do not maintain it. Mr. Dennett and Mr. Coppard, two of the trustees under Thomas Holman's will, do indeed state in evidence that, in February 1806, they signed a letter to the defendant, making a formal offer of 500*l.* a year for the farm, and that they were afterwards told by Foster, their bailiff, that he had delivered this letter to the defendant. This declaration of Foster is not evidence; but, if it were so, the fact is immaterial, because Borrer, the other trustee, swears that, before this letter was written, he had himself seen Lord Selsey, and had made him an offer of the 500*l.* a year. When Lord Selsey therefore confirmed the agreement with the defendant, by permitting him to take possession of the farm, he was fully aware of this offer of 500*l.* a year; and it appears, by the evidence of many [\*52] letters, that, in consequence of Mr. Borrer's offer, the defendant proposed either to give up his agreement altogether, or to submit to any new valuation which Lord Selsey should think fit to order; and that Lord Selsey,

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expressing a marked confidence in Mr. Eager's judgment and integrity, determined to abide by his valuation.

The point, however, which appears to be most insisted upon by the plaintiffs, is that Mr. Eager, who valued the farm at the rent which the defendant agreed to give for it, much under-rated the right of common which belonged to the farm, and that the defendant's agreement fails therefore for want of a fair and adequate consideration. It appears, in evidence, that, in the management of Lord Selsey's estate during the agency of the defendant, it was the habit, when a lease was about to expire, to have the farm valued, and to relet the valuation; and that Lord Selsey employed three different surveyors in such valuations, Mr. Eager, Mr. Florance, and Mr. Emery. When Lord Selsey consented that the defendant should have Amberley farm, it appears, by one of Lord Selsey's letters, that his lordship selected Mr. Eager for the valuation of this farm, and another farm called Rackham farm. It further appears that Lord Selsey had no map or plan of his estate; and that Mr. Eager, being furnished with the counterpart of the lease of Amberley farm, did, as upon other occasions, obtain his information as to the particulars of the farm from persons employed upon it, and principally from Foster the bailiff, and an old laborer.

I think the fair result of Mr. Eager's evidence is, that although he [\*53] did view the commons over which the tenant of Amberley farm claimed and exercised considerable rights, yet, in consequence of the information which he received as to the disputed nature of those rights, he did not put that value upon them which would have belonged to them if the rights had been undisputed. The nature of the dispute as to these rights of common, fully appears in the evidence of Mr. Florance, Mr. Emery, and Mr. Hanley the vicar. The bishop's copyholders insisted that the tenants of Amberley farm had only a right in the surplus feed, after the copyholders had fed; and the tenant of Amberley farm insisted that he had an equal right of common with the copyholders. When the inclosure afterwards took place, in 1810, the copyholders claimed their preferable right before the commissioners, but were advised by Mr. Tyler, their law agent, that if they had such right, they had lost it by not excluding the tenant of Amberley farm from intercommoning with them for many years; and, in consequence of this advice, the tenant of Amberley farm was permitted to share in the commonable lands equally with the copyholders.

I consider it therefore to be established as a fact that Mr. Eager's valuation did not rate the rights of common appurtenant to Amberley farm at the rent which they afterwards proved to be worth to the defendant. The question is how this fact bears upon the present case.

It is not and cannot, upon the evidence, be contended here, that the defendant had any other knowledge of the rights of common appurtenant to this farm than was communicated by Mr. Eager by Foster; or that he could by any

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means have enabled Mr. Eager to come to any certain conclusion as to the result of the dispute \*with the copyholders. The proportion of rent [\*54] to be fixed for the commons was necessarily a speculative rent; and Mr. Eager, employed by Lord Selsey, and utterly ignorant who might be his lessee, cannot be chargeable with partiality against Lord Selsey; and it is therefore no just cause of complaint for those who now represent Lord Selsey that, in the event, Mr. Eager's valuation proved more favorable to the tenant than he expected.

Independent of the particular objection as to the rights of common, the plaintiffs have entered into general evidence, to prove that Mr. Eager's valuation was too low. They have proved the valuation of Mr. Hemingway, the surveyor employed under the inclosure act, who in 1810 valued Amberley farm, without Cold Waltham, at 622*l.* a year. And they have further proved that Mr. Pinner, in 1820, valued the whole of Amberley farm at 840*l.* a year. But there were two witnesses, well acquainted with the farm at the time of Mr. Eager's valuation, Mr. Emery and Mr. Braby, who confirm Mr. Eager's valuation; and Mr. Pinner, who fixes the value of the rent at 840*l.* in 1820, says that he would rather have paid that rent in 1820, than have paid in 1603 the rent at which it was then valued by Mr. Eager. And, as to Mr. Hemingway's valuation, it is obvious it can form no safe criterion of prior value, because it appears in evidence that the farm had then been much improved by the defendant, and because his valuation comprises all the advantage which attended the inclosure.

Another objection made by the plaintiffs is, that Mr. Eager, in valuing the tithes, under-rated the number of acres. It turns out that Mr. Eager's mode of valuation \*of tithes is, not to value according to the gross num- [\*55] ber of acres, but to value upon what he considers to be the average number of acts productive of tithes.

Another objection is, that the term of the defendant's lease being for twenty-one years, was out of the usual course of management of Lord Selsey's estate. The fact, which depends entirely upon a passage in the defendant's answer, is not distinctly made out; but, if it were, it does not seem to me to be material; because the length of the term was obviously intended to be an indulgence and kindness to the defendant, in respect of his intention of placing his son upon the farm; and there is no rule of policy which prevents this bounty from the employer to his steward.

I do not think it necessary to advert more particularly to the alleged misrepresentation of the quantity of acres in Amberley farm in the rental of 1817, which in itself is nothing, and could only be used in aid of other presumptions. James Lord Selsey lived till February 1808, and John Lord Selsey, also party to the agreement with the defendant, till the 25th of June 1816; and no question appears to have been raised with the defendant until 1820.

Upon the whole, therefore, I am of opinion that the lease granted to the



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defendant is not to be avoided in respect of the relation in which the defendant stood to the lessor, and that this bill must be dismissed, with costs. If the present Lord Selsey is advised that he can impeach this lease on another ground, that it is a fraud upon the leasing power, the law will still be open to him.

Bill dismissed, with costs.[1]

[\*56]

\*DUNN v. CALCRAFT.

1824, 13th May.—*Pleading*.—*Annuity*.

Unless a defect in the memorial of an annuity is stated in the pleadings or evidence, no advantage can be taken of it.

THIS was a petition of rehearing.

The bill was filed to establish a lien upon a fund in court, in respect of the arrears of an annuity due to the plaintiff.

In March 1793, Charles Sturt, being tenant for life of considerable real estates, conveyed them to trustees, upon trust to apply the rents and profits, in the first place, in payment of an annuity of 2,400*l.* and, subject thereto, in trust for himself. By an indenture, dated the 3d of April 1793, Charles Sturt granted to Edward May two annuities of 125*l.* each, one for the term of one hundred, and the other for the term of one hundred and one years, if he (Sturt) should so long live, and charged them upon all his interest in the real estates comprised in the deed of March 1793, which were demised to a trustee for the purpose of securing payment of these two annuities. In July 1793, Richard Packer purchased the former of these two annuities of Edward May, for 850*l.* and had it duly assigned to him by deed, to which Sturt was a party, together with all arrears. After this the trustees under the deed of March 1793 entered into receipt of the rents and profits of the real estates.

In the year 1800, Richard Packer filed his original bill in this court, against Charles Sturt and these trustees, for an account of the arrears of the annuity which he had purchased, and for an account of the rents and profits

[\*57] \*received by the trustees, and to have them applied in payment of his annuity, subject to the payment of the prior annuity of 2,400*l.* To this

[1] This case has been affirmed in the house of lords. The court refused to set aside a voluntary deed executed by an old and infirm man, in favor of a person who had attended him as a surgeon, and had been occasionally consulted by him respecting the management of his property, and received the dividends of some stock for him, it appearing that the nature and effect of the deed were fully explained to the grantor by his solicitor, before he executed it, and that he executed it of his own free will; *Pratt v. Barker*, 1 Sim. 1, S. C.; affirmed, 4 Russ. 507. See further, *The Earl of Winchelsea v. Garrett*, 1 Mylne & Keene, 253; *Philips and others v. Belden and others*, 2 Edw. 1; *Hunter v. Atkins*, 3 Mylne & Keene, 113; *Dent v. Bennett*, 7 Sim. 539, S. C. 4 Myl. & Cr. 269.

bill Sturt and the other defendants put in their answers; but it did not appear that they alleged any objection to the validity of the annuity claimed by Packer. The answer of Sturt denied that he had received the whole consideration money. The trustees admitted that they had entered into possession, but alleged that the rents and profits were not sufficient to keep down the annuity of 2,400*l*.

By indentures dated the 4th and 5th of January, 1803, Sturt conveyed his real estates, subject to prior charges, to Runnington and others, as trustees, for the benefit of his creditors. After this, one Scott, claiming as a specialty creditor of Charles Sturt, filed his bill against Portman, one of the trustees under the will of Sturt's father, and others, praying that the trusts of this last deed might be executed. Answers were put in to Scott's bill, by which the trustees in possession of the estates admitted large balances in their hands in respect of rents and profits, after payment of the annuity of 2,400*l*.

In 1812, Charles Sturt died, having made his will, and appointed John Calcraft his executor, who proved the will.

Soon after Sturt's death, Bowen, and other persons claiming as his creditors, filed their bill against his executor, and against the trustees of the deed of 1803, for an account of Sturt's assets, and to have them applied in a due course of administration. In December 1813, on a motion made in these two last causes, *Scott v. Portman*, and *Bowen v. Runnington*, \*the trustees were ordered to pay into court, on account of rents and [\*58] profits in their hands, several sums, amounting in the whole to 7,457*l*. 6*s*. 4*d*. These sums were paid in accordingly, and invested in stock.

Packer then filed a bill of revivor and supplement, alleging that these causes had been instituted, and the money paid into court, without any notice to him, and that he was designedly kept in ignorance of them; and praying that the fund in court, in the other causes, might be applied in payment of the arrears of his annuity of 125*l*.

In December 1814, Joseph Dunn purchased of Packer all his interest in the annuity and the arrears, and it was assigned to him accordingly. Dunn, thereupon, filed his bill of revivor and supplement, in which he waived all further accounts of rents and profits against the trustees, being satisfied that the fund in court was sufficient to answer his claim; and therefore praying that it might be declared that the fund in court was liable to the arrears of his annuity.

The answer of Calcraft, Runnington, and the other defendants stated that they, or any or either of them, could not, as to their knowledge, information or belief, answer and set forth, save as it appeared by the bill, whether Sturt duly executed the grant of the annuity, nor whether the indenture of assignment to Packer was duly executed, nor whether, at the time of filing his bill, Packer became and was well entitled to the annuity; but they submitted to the court that the surplus rents and profits of the estates were not applicable to the payment of the arrears of this annuity, otherwise than as a debt

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1824.—*Dunn v. Calcraft.*


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[\*59] owing by Charles Sturt to \*Packer, as a general creditor; and they also submitted that Dunn was not entitled to have the funds in court sold and applied in payment of the arrears of the annuity of 125*l.*, inasmuch as he had not (as they submitted) any specific lien on those funds.

The execution of the deed of assignment to Packer, to which Sturt was a party, and payment of the consideration money, were proved on the part of the plaintiff.

When the cause came on to be heard before the Vice-Chancellor, a decree was made, referring it to the master to inquire and state to the court whether the plaintiff Dunn was entitled to any and what annuity charged upon the estates in question; and, in case the master should find that the plaintiff was entitled to an annuity, then it was declared that he had a lien upon the funds in court for the arrears of it.

While the proceedings in the master's office under this decree were depending, the defendants, for the first time, took objections to the validity of the annuity, and contended that it had become void by reason of the memorial of it, enrolled in chancery, not stating a proviso for redemption which was contained in the deed. The master entered into the consideration of this objection, and reported that a sufficient memorial had not been enrolled, and, therefore, that the plaintiff was not entitled to any annuity.

The plaintiff took exceptions to the master's report; and, on the argument of them, contended that the defendants were not entitled to raise such [\*60] an objection to the annuity, as that point had not been put in issue. \*The court, however, thought, that, in order to raise the question whether it was or was not too late to make the objection to the validity of the annuity, there must be a rehearing of the cause. A petition of rehearing was therefore presented, and it now came on to be heard.

Mr. Hart, Mr. Barber, and Mr. Stuart, for the plaintiff:—The execution of the deeds under which the plaintiff claims was proved in the cause. The question as to the validity of the annuity might have been put in issue by the defendants if they had chosen it, but they did not put in issue any thing as to the validity of the memorial. It is now fully settled that, if the grantor of an annuity means to question the validity of it in any action or suit which seeks to recover the annuity, he must state his specific objection to the annuity. If, instead of putting any specific objection in issue, the defence is merely, as in this case, an averment of ignorance whether such an annuity was granted, the plaintiff has only to prove the execution of his deed. The bill, in this case, contains no averment that a memorial of the annuity was duly enrolled. In *Mosely v. Taylor*, a case lately heard before the Lord Chancellor, a bill was filed to recover the arrears of an annuity, alleging a breach of trust. The answer to the bill stated that the defendant did not know whether the annuity deed had been executed. The case was heard at the rolls, before Sir William Grant, and a decree was made, which directed a reference to the master. After the decree, it was found that the annuity was invalid. The cause was there-

1824.—*Mitchell v. Hayne.*

fore brought on for a rehearing before the Lord Chancellor, when his lordship held that the objection to the annuity \*had not been put in issue [\*61] by the defendant in such a manner as to entitle him to avail himself of it. No formal decision was given in that case; but the opinion of the Lord Chancellor was so clearly expressed that the party was induced to abandon the appeal. It is decided that, at law, if an action is brought on an annuity deed, it is enough for the plaintiff to declare on the deed, and, if the defendant pleads the general issue, he is not entitled to go into particular objections to the form of the memorial, in order to impeach the annuity. *Buck v. Tyle*, (a) *Doe v. Mason*, (b) *Simmons v. Hunt*. (c)

Mr. Sugden, and Mr. Newland, for the defendants, insisted that it was open to the defendants to state any objection to the annuity; and that, in point of fact, the defendants, who were mere trustees, could not raise such objections in any other way: that, until the plaintiff proved all the deeds under which he made out his claim, they could not be aware whether his claim was objectionable or not: and that, if it were otherwise, any annuity, however void, might safely be claimed after the death of the grantor; because the defendants, on the principle contended for by the plaintiff, could never have an opportunity of investigating his title.

The VICE-CHANCELLOR:—The objection to the validity of the annuity for want of a sufficient memorial, is not hinted at in any of the answers. The only objection taken by Mr. Sturt is, that he never received any consideration for the grant. But the plaintiff has proved the payment of the consideration expressed to Mr. May, the agent to Mr. Sturt. \*The memo- [\*62] rial is not a constituent part of the grantee's title, but is matter collateral, for want of which in due form, the grant may be defeated; but that matter collateral must be shown. The court must proceed upon the pleadings and proofs in a cause; and, upon these pleadings and proofs, I am not authorized to question the title of the plaintiff to this annuity. The language of the decree must, therefore, be corrected according to the original intention of the court, so as to leave it open to the master to inquire into the amount of the arrears, but not into the validity of the annuity.

Reg. Lib. 1823, B. f. 1319.

\*MITCHELL v. HAYNE.

[\*63]

1824, 28th May.—*Auctioneer.—Interpleader.*

If an action is brought against an auctioneer for a deposit, he cannot file a bill of interpleader, if he insists upon retaining either his commission or the duty.

THE plaintiff was an auctioneer, and had sold an estate, for one of the defendants. The other defendant was the purchaser, and had commenced

(a) 7 T. R. 495.

(b) 3 Campb. 7.

(c) 1 Marsh. 155.

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action against the plaintiff for the deposit; upon which the plaintiff filed a bill of interpleader against him and the vendor, and prayed for an injunction to restrain the action.

Mr. *Agar*, and Mr. *Crombie*, for the plaintiff, now moved for the injunction, and offered to pay the deposit money into court, after deducting the duty and commission.

Mr. *Koe*, for the purchaser, opposed the motion.

The VICE-CHANCELLOR:—Interpleader is where the plaintiff is the holder of a stake which is equally contested by the defendants, as to which the plaintiff is wholly indifferent between the parties, and the right to which will be fully settled by interpleader between the defendants. That is not this case. The plaintiff receives a deposit of 87*l.* 18*s.* 9*d.*, and claims, against both the defendants, to retain 27*l.* 16*s.* 10*d.* for his commission and the auction duty. And, by this motion, the plaintiff calls upon the defendants to interplead for the sum of 60*l.* 1*s.* 11*d.*, which he desires to pay into court. But the bill itself states that the action which is threatened by the defendant, the purchaser, is for the whole deposit of 87*l.* 18*s.* 9*d.*, and not for the sum of 60*l.* 1*s.* 11*d.* only, which is all that the defendant, the vendor, could claim. The plaintiff is not, therefore, an indifferent stakeholder, but has a personal question to maintain with the defendant, the purchaser; and, if, he seeks an injunction, must obtain it, not upon the principle of interpleader, but upon an order for time, or upon the answer.[1]

[1] Where the depository of a fund has a personal interest in contesting a question relating to part of the fund, with one of the claimants of it, he cannot properly file a bill of interpleader respecting it. *Moore v. Usher*, 7 Sim. 383. A bill of interpleader lies where two or more persons claim the same debt or duty of the plaintiff by separate interests; he should have no beneficial interest in the thing claimed; it must appear that he cannot determine the right without hazard to himself; he must make affidavit that he does not collude with either claimant, and must bring or offer to bring the money or thing claimed into court. *Atkinson v. Munks and others*, 1 Cowen, 691. *Shaw v. Coster and others*, 8 Paige, 339. S. C. 2 Edw. 405. And the want of such affidavit is a ground of demurrer, 2 Edw. 405. Such bill cannot be sustained if the plaintiff is obliged to admit that as to either of the defendants he is a wrong-doer; and if he states a case in his bill which shows that one defendant is entitled to the debt or duty and the other is not, both defendants may demur. *Shaw v. Coster and others; ubi sup.* Where a person is taxed in two different places for the same property, when he is liable to be taxed only in one of them, and when it is doubtful to which party the right to tax belongs, he may file a bill of interpleader, to compel the collectors of the tax to settle the right between themselves. *Thomson v. Ebbets*, Hopk. 272. *Mohawk &c. Rail Road Co. v. Clute and others*, 4 Paige, 384. A sheriff cannot maintain a bill of interpleader to settle conflicting claims as to personal property on which he is required to levy. *Shaw v. Coster and others, ubi sup.* A bill of interpleader is equally proper, though the party be not actually sued, or be sued by one only of the conflicting claimants, or though the claim of one defendant be actionable at law, and the other in equity. *Richards v. Salter and others*, 6 Johns. Ch. Rep. 445. *Warrington v. Wheatstone*, Jacob, 202. The plaintiff must offer to bring the fund in dispute into court; and he must show that he is ignorant of the rights of the different claimants, or at least that there is some doubt as to which of them is entitled to the fund, so that he cannot safely pay it to either. *Mohawk &c. Co. v. Clute and others, ubi sup.* It cannot be sustained where from the bill itself it appears that one of the defendants is clearly entitled to the debt or

1824.—*Brookfield v. Bradley.*

BROOKFIELD v. BRADLEY.

1824, 21st June.—*Practice.—Rehearing.*

Where, by mistake, sums paid into court under the decree were included in the balances reported due from the defendant; and the decree, on further directions, ordered those balances to be paid into court; held that the mistake could not be ratified without rehearing the cause on the latter decree.

THIS was a creditor's cause. The defendants, the executors, in their answer admitted that they had in their hands certain sums, part of the testator's personal estate and of the rents and profits of his real estates. The decree directed the master to inquire how much of these sums was produced from the personal estate, and how much from the real estate, and that the executors should pay them into court, to be placed to the personal estate and of the real estate respectively; and the master was also to take the usual accounts of the personal estate, and of the rents and profits of the real estate possessed by the executors. The master made his report, stating the parts of the sums mentioned in the answer which consisted of real and personal estate, and also stating the balances due from the executors, which included the sums men-

duty claimed, to the exclusion of the others. *Ibid.* If the defendants or either of them, deny the allegations in the bill, or set up distinct facts in bar of the suit, the complainant must reply to the answer, and close the proofs in the usual manner, before he can bring his cause to a hearing. *The President &c. of the City Bank v. Bange and others*, 2 Paige, 570. If the cause is ripe for a decision between the defendants, as well as between them and the complainant, the court settles the conflicting claims of the parties, and makes a final decree on the first hearing. *Ibid.* Where the suit is not in readiness for a decision between the defendants, the court merely decides that the bill is properly filed, and dismisses the complainant with his costs up to that time; and directs an action to be brought, or an issue, or a reference to ascertain and settle the rights of the defendants to the fund in controversy. *Ibid.* If one defendant establishes a title, and the other makes default, the court will decree payment to the one, and award a perpetual injunction against the other. *Richards v. Salter, ubi sup.* Upon the hearing of an interpleading bill evidence is admissible to show, that the plaintiff has retained possession of the subject of the suit under an indemnity from some of the defendants. *Statkam v. Hall*, 1 Turn. & Russ. 30; *Warrington v. Wheatstone, ubi sup.* "The injunction on an interpleading bill does not, like the common injunction, leave the plaintiff at law at liberty to demand a plea and proceed to judgment, but it stays all proceedings. The plaintiff in an interpleading bill admits that he has no defence, and makes an affidavit that he does not collude with either party; the protection that he has in, that he is relieved from their proceedings against him, whether at law, or in equity, as soon as his diligence enables the court to do so." The plaintiff (and under special circumstances, the defendants,) is entitled to his costs out of the fund; and the defendant who fails is ordered to pay the other defendant his costs, and also the costs which the plaintiff has taken out of the fund. *Richards v. Salter; Atkinson v. Manks; and Thomson v. Ebbetts, ubi sup.* A decree that the bill of interpleader is properly filed, is the only decree the plaintiff is interested in obtaining; and from it an appeal lies. *Atkinson v. Manks, ubi sup.* Where it appeared upon the face of a bill of interpleader, that it was not a proper case for such a bill, and the defendants instead of demurring, put in answer and went to a hearing upon pleadings and proofs, insisting however that the bill was improperly filed, the Chancellor on dismissing the bill only allowed the defendants the costs to which they would have been entitled if they had demurred, and the bill had been dismissed upon the allowance of the demurrers: *Shaw v. Coster and others, ubi sup.* See further *Campbell v. Solomons*, 1 Sim. & Stu. 462; *Townley v. Deare*, 3 Beav. 213; *Swart v. White*, 4 Myl. & Cr. 305; *Crawshaw v. Thornton*, 2 Myl. & Cr. 1.

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1824.—In the Matter of St. Wenns Charity.

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tioned in their answer. Pursuant to the decree and report, the executors paid into court the sums mentioned in their answer, which were accordingly carried over to the accounts of the real and personal estate.

[\*65] \*The cause was afterwards heard on further directions, when the fact of these sums having been paid was omitted to be noticed, and the decree directed that the executors should pay into court the whole balances reported due from them, part of which was directed to be placed to the account of the personal estate, part to the account of the real estate devised, and part to the account of the real estate descended.

The executors now presented a petition, praying that the decree made on further directions might be corrected, and that they might be ordered to pay into court the difference between the balances found due from them and the sums already paid in; and also praying the proper directions for apportioning the sums already paid in and those to be paid in, and carrying them over to the different accounts of the personal estate, the real estate devised, and the real estate descended.

Mr. Hart, and Mr. Garratt, in support of the petition, cited *Weston v. Haggerston*,<sup>(a)</sup> where an error in a decree was corrected upon motion; and submitted, that as the other parties to the cause did not object, the mistake which had occurred in this instance might be set right without the necessity of a rehearing.

The VICE-CHANCELLOR:—The case of *Weston v. Haggerston* applies only to errors of figures apparent upon the face of the decree. Here the cause must be reheard. It is not only necessary to strike out the order of payment by the defendant, but to insert new directions upon the corrected fact.[1]

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[\*66]

\*In the Matter of ST. WENNS CHARITY.

1824, 21st June.—*Charity.—Jurisdiction.*

The court has no jurisdiction under the 52d Geo. 3, c. 101, to direct, upon petition, an account of the assets of a person who had received the rents of a charity estate.

THIS was a petition, presented under the 52d Geo. 3, c. 101, relating to a charity founded in the 15th Charles 2. It stated that Philip Rashleigh, from 1764 until June 1811 (when he died,) had managed the charity; and that, at his death, there remained in his hands a large surplus of the rents of the charity estates: that his executors had possessed his personal estate, and divided the residue amongst his residuary legatees. The petition therefore prayed for an account of the rents of the charity estates received by Philip Rashleigh, that what should be found due might be paid by his personal representatives out of

(a) Coop. 134.

[1] An omission in a decree of any matter which would have been inserted as a thing of course may be supplied on motion; but where there is an important error or omission, a rehearing must be applied for. *Gardner v. Dering and others*, 2 Edw. 131.

1834.—Attorney General v. Heelis.

his assets ; and that, if they should not admit assets sufficient to answer what should be found due, the usual accounts might be taken of his personal estate.

The petitioners were the trustees of the charity estates, who had been appointed by an order made in the year 1818. Philip Rashleigh's residuary legatees had not been served with a copy of the petition.

The *Solicitor General* and Mr. *Longley* for the petitioners.

Mr. *Heald* for Philip Rashleigh's representatives.

The Vice-Chancellor dismissed the petition with costs, because the residuary legatees of Philip Rashleigh had not been served with the petition ; and because he had no jurisdiction under the act to direct an account of Philip Rashleigh's personal estate as against his personal representatives.

\*THE ATTORNEY GENERAL v. HEELIS.

[\*67]

1824, 3d June.—*Charity.—Pleading.*

Where a common was inclosed under an act of parliament passed with the consent of the proprietors, and was vested in commissioners, upon to trust to apply the rents for the improvement of a town with power to them to levy a rate on the inhabitants in case the rents proved deficient, an information and bill being filed by some of the inhabitants, on behalf of themselves and the others against the commissioners, for an account of the rents alleging misapplication, and that a rate levied was unnecessary ; held, on general demurrer, 1st, that the funds constitute a charity ; and 2d, that the object of the suit being to avoid the rate, the plaintiffs had a right to sue on behalf of themselves and the other inhabitants.

Where the object of a suit is to avoid payment of a rate levied on the inhabitants of a town, all the inhabitants having a common interest to avoid the rate, any one or more of them may sue on behalf of himself and the other inhabitants.

Funds supplied from the gift of the crown or of the legislature, or of private persons, for any legal public or general purpose, are charitable funds, to be administered by courts of equity.

Where a fund applicable for a public or general purpose is derived wholly from rates or assessments under an act of parliament, being in no respect derived from bounty or charity, it is not a charitable fund to be administered by a court of equity.

THIS was an information and bill, in which ten persons were the relators and plaintiffs, on behalf of themselves and all the other tenants and occupiers of houses and other premises situate in Great Bolton, in the county of Lancaster, subject to the rates or assessments, and entitled to the benefit of the acts of parliament after mentioned. The defendants were the trustees under those acts of parliament.

An act of parliament was passed in the 32d Geo. 3, with the consent of the lords and proprietors of the common called Bolton Moor, for inclosing that common, and widening, paving, lighting, watching, cleansing, and regulating the streets of Great Bolton and Little Bolton, and supplying those towns with water, and with fire-engines, and hackney coaches and chairs. The act appointed certain commissioners and trustees for effectuating the purposes of the act, and directed them after setting out highways, and making certain al-



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lotments, to set out all the remainder of Bolton Moor in lots, and to sell and demise them for a term of five thousand years, reserving a rent, subject to the immediate payment of 10*l.* an acre, and out of the money to be [\*68] produced thereby to defray \*two-thirds of the expense of passing the act, and the expenses of the commissioners, and to pay the residue into the hands of a treasurer, to be appointed by the trustees, for the uses after mentioned. And it enacted, that the clerk of the trustees should cause regular entries of the proceedings of the trustees to be made in books to be kept for that purpose, and that such entries should be evidence in all courts, and the books to be open to the inspection of all persons who should be taxed and assessed for the purposes of the act. The act also empowered the trustees to put up lamp-posts and irons in the towns of Great and Little Bolton, and to contract for paving, lighting, and cleansing the streets of those towns, and for conveying water thereto, and for appointing watchmen, and to build and provide a house and offices for the use of the peace officers of those towns, and to make sewers and drains. And it enacted that whenever the moneys coming to the hands of the trustees for Great Bolton, from the lands and grounds thereinbefore directed to be sold, should be insufficient to defray the costs, charges, and expenses of carrying into execution the purposes of that act within the town of Great Bolton, then in every such case, but not otherwise, it should be lawful for the said trustees, once in every year, or oftener as occasion should require, to ascertain the sum or sums of money to be raised by rates or assessments on the several inhabitants of the town for the purpose aforesaid, and to raise thereby such sum or sums of money, from time to time, not exceeding in the whole the sum of two shillings and sixpence in the pound in one year, upon the several tenants and occupiers of all messuages, houses, warehouses, &c. within the town of Great Bolton; and power was [\*69] thereby given to levy these rates and assessments by distress. \*The act also contained a power to the trustees to borrow money at interest or by way of annuity, upon the credit of the rents, rates, and assessments before mentioned, the sums so borrowed to be applied only for the purposes of the act. It likewise provided that if the rents arising from the allotments of the land should be more than sufficient to defray the expenses of executing the purposes of the act in the town of Great Bolton, and there should be no money due on mortgage or annuity, on the credit of the rents, rates, and assessments, in every such case the overplus remaining in the hands of the trustees on the 29th of September in every year should be by them paid over to the overseers of the poor of the town of great Bolton, for the time being, to be by them applied in the same manner as the rates for the relief of the poor within the town. The act contained a clause enabling the commissioners to sue and be sued in the name of their secretary; and also a clause giving jurisdiction to the duchy court of Lancaster as to all matters of a civil nature relating to the purposes of the act.

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Another act for granting further power for improving the town of Great Bolton was passed in the 57th Geo. 3. By this act further powers were granted to the trustees appointed under the former act, enabling them to re-sell certain lots of Bolton Moor, for the purposes of the act ; and it was enacted, that no person should act in the capacities both of clerk and treasurer ; and that the trustees should cause a book to be kept by their clerk, in which such clerk should enter a regular account of all sums of money paid and received on account of the two acts of parliament, and for what the sums \*were [\*70] paid, which was to be open to the inspection of any person who should pay to any rate or assessment to be made under the act ; and all such persons were to be at liberty to take copies thereof and inspect them,

After setting forth these acts, the information and bill stated, that the commissioners and the trustees had proceeded to allot and dispose of Bolton Moor, and had paid over into the hands of their treasurer large sums of money produced from that source ; but had expended these sums in a manner which the plaintiffs could not discover ; and had not applied them for the purposes required by the acts of parliament : that the sums received for rents of the allotments were very large, and were sufficient for the purposes of the act, without borrowing any money or levying any rate ; but that no accounts had been kept or entered in books according to the directions of the act of parliament : that the defendants had refused to allow the plaintiffs to inspect their books, and that the clerk of the defendants had, under their directions, refused such inspection : that the defendants had misapplied the funds received under the acts of parliament, and had alleged that the funds received from the rents were insufficient for the purposes of the act, and imposed upon the inhabitants of Great Bolton a rate of sixpence in the pound under the powers conferred by the acts, and had issued warrants of distress to levy this rate.

The information and bill charged that no rate was necessary ; that this was the first rate which had been imposed under the authority of the act, and that it had been imposed by a very small majority of the trustees, and since it had been imposed that several of the trustees \*had declared that no [\*71] such rate was necessary. It therefore required the trustees to discover how the funds had been applied by them, and insisted that, under the circumstances mentioned, the defendants should be prevented from enforcing the rate, and charged that they had no other means of preventing the warrants of distress for levying the rate from being executed, but by the interference of this court.

The prayer was, that the trust funds vested in the defendants might be administered under the direction of the court : that an account might be taken of all the estates, rents, and property vested in the defendants under the acts of parliament set forth in the information, so far as those acts related to the town of Great Bolton ; and also an account of all payments duly made by the defendants, and that it might be declared that the defendants were personally liable to pay, and might be decreed to pay what should be found, upon taking the accounts, to have been improperly expended by them ; and that it might be de-

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clared that the rate or assessment mentioned in the information ought not to be raised, and ought to be quashed; and that the defendants might be restrained by injunction from issuing any warrants of distress for levying the rate.

To this information and bill the defendants put in a general demurrer for want of equity.

Mr. *Horne* and Mr. *Pemberton* for the demurrer:—

I. No six individuals, nor any number of individuals, have a right to institute such a suit as this. The question is one of the greatest importance. In a case lately \*before the Lord Chancellor, *Jones v. Del Rio*, [72] where certain subscribers to the Peruvian loan filed a bill on behalf of themselves and all other persons subscribers to the loan, for an account of the subscription moneys, and to rescind their contract, the Lord Chancellor held that a party was not entitled thus to assume the character of representative of all the subscribers, and had no right to maintain such a bill. Upon the present case it must be decided, whether any five or six paupers in a town have a right to institute a suit on behalf of themselves and the people of the town, against all the principal inhabitants, touching any assessments for local and public purposes?

II. The funds in this case are not a public charity; *Attorney General v. Brown*. (a) In that case the court went a great way to hold that funds arising under an act of parliament and applicable to a public purpose, were charitable funds. But in this case, where the funds in respect of which alone the plaintiffs are interested, arise merely from an assessment under the authority of an act of parliament, for the purpose of improving a town, it is going a step farther than any authority warrants to consider it as the case of a public charity.

III. If there has been such misconduct as the information alleges, the proper course was to take proceedings at law, and not to come to the court of chancery. Besides these objections, the clauses in the act of parliament which give jurisdiction to the duchy court of Lancaster, and which direct that the commissioners shall sue and be sued in the name of their treasurer, [73] who is \*the party possessed of all the funds, are strongly against the right to institute such a suit as the present.

Mr. *Hart* and Mr. *Spence* for the relators and plaintiffs:—

I. The main question is, whether the subject of this suit is not a charitable institution, in the enlarged sense in which this court considers the term charity? According to all the principles on which this court acts, and according to all the authorities on which those principles have been stated and recognized, this must be held to be a general charitable institution, in which all the inhabitants of the town of Great Bolton are interested. In *Howse v. Chapman*, (b) where a testator gave by his will portions of his property to his executors, to be by them converted into money, and directed certain payments to be made

(a) 1 Swan. 265.

(b) 4 Ves. 542.

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 1824.—Attorney General v. Heelis.
 

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out of the money so to be produced, and went on in these words, "And in the next place, my will is, that the residue of the money be appropriated to the improvement of the city of Bath, and be placed by my executors in the bank of Messrs. Hobhouse & Co. in this city, at the rate of three per centum per annum, and that it shall be drawn out of the said bank as the improvements shall require." Lord Rosslyn declared that these words constituted a charitable bequest. It is, therefore, clearly established, that a gift by an individual of funds for the improvement of a town, constitutes a charity. But it was not necessary that a fund should proceed from the gift of an individual, provided it were applicable for a general public purpose. Here there was a general dedication of the property, which, though it flowed from the parish at large, was as much a charitable \*institution as if it proceeded from one in- [\*74] dividual. The case of *The Elephant and Castle Charity*, (c) is of the same kind. It was common land given by the lord of the manor for the maintenance of a school; yet it was never thought of contending that it was not within the jurisdiction of this court as a charity. If common lands dedicated to the improvement of a town be a charity, there can be no doubt the court has jurisdiction, and the attorney general has a right to sue in this court to have it properly administered. *Gort v. Attorney General*. (d)

II. The next question raised is, whether it be competent to add individual rights to the general right of the charity, so as to seek relief in respect of both in the same suit? The case of *Jones v. Del Rio*, which has been mentioned, has no application and involved no question as to a general right or a public institution. In *Adair v. The New River Company*, (e) it was established, that, where parties are so interested in the subject matter of a suit that it would be imperfect unless they were represented before the court, but are so numerous as to make it inconvenient to join them all individually as parties, the court allows a sufficient number of them to be made plaintiffs and defendants, as on behalf of themselves and the others. All that the court looks to in such cases is to see whether there be a sufficient number of parties to enable the question to be properly decided.

The other objections are of no weight. Could it be said that replevin would be a remedy against the distresses \*issued under the power [\*75] contained in these acts? If so it could only be by having, perhaps, a thousand separate replevins, and having a court of law to pronounce upon the administration of trust property.

Mr. Pemberton, in reply:—The acts of parliament can not be so construed as to constitute the defendants trustees. The acts give a discretion to them, with the consent of the majority, as to the mode in which the funds should be applied for the benefit of the town. It might be, for any thing that now appears, that the majority of the inhabitants concurred with the defendants, and that the plaintiffs were the only inhabitants who made any objection. If that

(c) Now before the Lord Chancellor.

(d) 6 Dow. 137.

(e) 11 Ves. 429.

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were so, it would be impossible to say that this information and bill could be maintained.

The VICE-CHANCELLOR:—This is an information and bill by the Attorney General and certain persons, on behalf of themselves and all others, who are assessed to a rate made under the authority of the defendants, insisting that the defendants are in effect trustees for certain charitable purposes, with power to make the rate in question only in case the charitable funds are insufficient, and that the charitable funds are ample for the purposes required; and praying, therefore, amongst other things, an account of the charitable funds, and of the application thereof by the defendants, and that in the meantime the defendants may be restrained from enforcing the payment of the rate so made by them. To this bill the defendants have put in a general demurrer, and the first point made by them is, that the plaintiffs to the bill have not a right to sue on behalf of all other persons on whom the rate in question is assessed; [\*76] and a late case of *Jones v. Del Rio*, before the Lord Chancellor, is cited as an authority for that proposition. There the plaintiff, being one of the subscribers to the Peruvian loan, filed a bill on behalf of himself and all other subscribers to that loan, to rescind the contracts of subscription, and to have the subscription moneys returned. The Lord Chancellor held that the plaintiff was not entitled in that case to represent all others the subscribers, for that it did not necessarily follow that every subscriber should, like the plaintiff, wish to retire from the speculation, and that every individual must judge for himself in that respect. The principle of that case has no application here. The object of the bill is to avoid payment of the assessment in question, and every individual assessed has in that respect one common interest.[1]

The next and most important point made by the defendants is, that this is not a case in which a court of equity has jurisdiction to compel an account. It must be admitted that a court of equity has, in this case, no authority to compel an account, unless the funds in question are charitable funds. In the case of the *Attorney General v. Brown*, which has been much referred to in the argument, I had occasion to consider this sort of subject very fully. I am of opinion, that funds supplied from the gift of the crown, or from the gift of the legislature, or from private gift, for any legal, public, or general purpose, are charitable funds to be administered by courts of equity. It is not material that the particular public or general purpose is not expressed in the statute of Elizabeth, all other legal, public, or general purposes being within the equity of that statute. Thus, a gift to maintain a preaching minister; a gift to build a sessions house for a county; a gift by parliament of a duty on coal imported into London, for the purpose of rebuilding \*St. Paul's Church, after the fire in London; have all been held to be charitable uses within the equity of the statute of Elizabeth.

I am of opinion that it is the source from whence the funds are derived

[1] Vide ante 26, note.

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 1824.—Hall v. Bennett.
 

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and not the mere purpose to which they are dedicated, which constitutes the use charitable; and that the funds derived from the gift of the crown, or the gift of the legislature, or from private gift, for paving, lighting, cleansing, and improving a town, are, within the equity of the statute of Elizabeth, charitable funds to be administered by this court.[1] But where an act of parliament passes for paving, lighting, cleansing, and improving a town, to be paid for wholly by rates or assessments to be levied upon the inhabitants of that town, the funds so raised, being in no sense derived from bounty or charity, in the most extensive sense of that word, are not charitable funds to be administered by this court.

To apply these principles to this case. The funds vested in the trustees to be in the first place applied in the improvement of the town of Great Bolton, are the purchase moneys, rents and profits of a certain part of Bolton Moor, which the commissioners are by the act of parliament authorized to sell for a term of five thousand years, receiving a rent. Before the passing of this act, Bolton Moor was the property of the lords of the manor of Bolton, and of certain personal owners and proprietors of certain lands, messuages and tenements within the said manor, who had rights of common on the moor. The act of parliament, with the consent of the lords and persons having rights of common on the moor, dedicates the property of a very large part of this moor to the improvement of the town of Great Bolton. This is, in effect, a gift by the lords and persons having rights \*of [\*78] common for the public purpose of improving the town, and the funds given are therefore charitable funds to be administered by this court.

It was said that the defendants, the trustees do not, under the provisions of the statute possess these funds, and are not therefore to account for them: that the treasurer alone possesses them. Upon looking into the provisions of the statute, in this respect, I am of opinion that the trustees do possess, and administer these funds, and are accountable for them, and that the treasurer is merely their servant.(f)

Let the demurrer be overruled.

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### HALL v. BENNETT.

1824, 18th June.—*Solicitor*.—*Costs*.

Bill filed by a solicitor on instructions furnished by the brother-in-law of the plaintiff, without any communication with the plaintiff himself, being dismissed with costs; the solicitor ordered to pay the costs, it appearing that the plaintiff had absconded before the bill was filed.

(f) See Mitf. Pl. 3d Edit. 187.

[1] Vide *Attorney General v. Mayor of Carlisle*, 2 Sim. 437. *Attorney General v. Mayor &c. of Liverpool*, 1 Mylne & Craig, 171. *British Museum v. White*, post, 594.

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 1824.—*Shackell v. Macaulay.*


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THE bill in this case had been dismissed with costs from want of prosecution.

The court was moved on behalf of Feavor and Marshall, two defendants, that the solicitor, who had filed the bill for the plaintiffs, might pay the defendants their taxed costs, on the ground that the plaintiff had absconded eight years before the bill was filed; and that the solicitor, who filed it, never had any communication with him, and did not receive his instructions from him, but from his brother-in-law.

\*Mr. *Pemberton*, for the motion, relied on *Wilson v. Wilson*(a) and [\*79] *White v. Stanley*.(b)

Mr. *Horne*, for the solicitor, opposed the motion.

The Vice-Chancellor ordered the solicitor to pay the costs.

Reg. Lib. A. 1823, f. 1770.

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#### SHACKELL v. MACAULAY.

1824, 30th June.—*Pleading.—Multifariousness.*

Demurrer allowed to a bill for a discovery, and commissions to examine witnesses in aid of the defence to two separate actions for two separate libels.

THIS was a bill for a discovery, and commissions to examine witnesses abroad in aid of a defence to two separate actions for two separate libels published by the plaintiff. The defendant demurred to the bill.

The bill stated, that for some years past a weekly newspaper had been published called *The John Bull*; that in the latter end of the year 1823 a controversy arose respecting the state and condition of the West India Islands, and the slave population there; that the plaintiff *Shackell* had published, in *The John Bull* newspaper, (of which the plaintiffs were proprietors,) divers articles of intelligence, arguments, and observations about that controversy; that the defendant took an active part in that controversy, on the side opposite to that advocated by *The John Bull* newspaper; that, on the 26th of October 1823 an article was published in *The John Bull* newspaper in the words and figures set forth in the bill; and that on the 9th of November 1823 another article was \*published by the plaintiff, in the same newspaper, in the words and figures also set forth in the bill. [\*80]

The bill averred that the several witnesses, by whose testimony the plaintiffs could prove the truth of the allegations contained in those articles, had gone abroad, and that after they had gone abroad the defendant commenced two several actions at law against the plaintiffs in the court of king's bench, and had declared in those actions; and in the first count of the declaration filed in one of them, complained of the whole passage published on the 26th

(a) 1 Jac. & Walk. 457.

(b) Ibid. 674.

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of October, as a false, scandalous, malicious, and defamatory libel of and concerning him, the said defendant ; and in the 2d, 3d, and 4th counts, set forth particular parts of the passage, and laid his damages in that action at 10,000l:—That by leave of the court of king's bench the plaintiffs pleaded divers pleas to this action, in justification of the several allegations contained in the passage printed on the 26th of October, and alleged by these pleas that the several allegations in the passage were true : that, in the first count of the declaration in the other action the defendant set forth the whole passage published on the 9th of November, and charged it to be a false, scandalous, malicious, and defamatory libel concerning him the defendant ; and in the 2d, 3d, 4th, 5th, and 6th counts, set forth particular parts of the passage, and laid his damages in this last action at 10,000l. ; and that the plaintiffs, by leave of the court of king's bench, pleaded several pleas to this last action in justification, averring that the allegations contained in the passage complained of were true.

The bill then set forth, by way of charge, all the averments contained in the pleas of justification, and charged that they were true ; and alleged that divers \*witnesses, by whom alone the truth of the pleas could be [\*81] proved, were abroad on the west coast of Africa, and in the West Indies, and concluded with the following prayer :—" That the said defendant may make a full discovery of the matters aforesaid, and that one or more commission or commissions may issue out of this court for the examination of witnesses residing on the west coast of Africa, or in the West Indies, or other parts beyond the seas, out of the jurisdiction of this court, as to the several matters aforesaid, with all proper and usual directions in that behalf ; and that the plaintiffs may have the benefit of the testimony of such witnesses respectively on the trial of the said actions. And that, in the meantime, the defendant may be restrained, by the order and injunction of this court, from further proceeding in the said actions, and each of them, and from all other proceedings at law against the plaintiffs or any or either of them, in regard to the matters aforesaid."

To this bill the defendant put in the following demurrer:—" This defendant, by protestation, &c. and for cause of demurrer sheweth that the said complainants have not in and by their said bill shown any right or title to the discovery, or to the commission and injunction, thereby sought ; and for further cause of demurrer this defendant sheweth that the discovery and commission by the said bill sought relate to several distinct matters by the said bill alleged to have been pleaded by the said complainants to two several and distinct actions at law, in the said bill alleged to have been commenced by this defendant against the said complainants, and \*which two several actions [\*82] appear by the said bill to relate to several and distinct matters, and to be founded on several and distinct causes of action, and such several and distinct matters so pleaded by the said complainants to the said two several actions



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ought not to have been joined together in one bill: wherefore, and for other causes apparent, &c."

The demurrer now came on to be argued.

Mr. *Pepys* and Mr. *Garratt*, for the demurrer:—The first ground on which this demurrer is to be supported is the same which was relied on in the case of *Thorp v. Macaulay*.(a) But as the decision in that case is under appeal, the point is not now insisted upon here.

2d. This bill is multifarious, inasmuch as it prays discovery and commissions to examine witnesses in aid of a defence to two separate and distinct actions at law. The bill seeks to have separate commissions for the examination of witnesses in two different quarters of the globe, in Africa, and in America. A bill of this kind clearly comes within the accurate definition of multifariousness, given in the judgment in *Salvidge v. Hyde*.(b) A commission to examine witnesses in Africa, under this bill, cannot be to examine them in aid of the defence to both the actions. The object of the bill is to enable the plaintiff in this court to go to trial in two separate actions. The commission in aid of the defence to one of the actions may be returned in a shorter time than in aid of the defence to the other; and the very witnesses whose [\*83] depositions may have been read as \*evidence in the first action, may be in this country at the time of the trial of the last action, in which their testimony is also to be received. And suppose the injunction prayed by this bill were granted, how could it be dissolved as to one of the actions and continued as to the other? There are matters mixed up in those actions which are perfectly separate and distinct. Where matters are joined in the same bill, which require the publication of the depositions of the same witnesses at one time, and other depositions by them at a subsequent time, it has been decided that the bill is multifarious. *Dew v. Clarke*,(c) is a case almost directly in point; and in the decision of the present case the defendant only asks for the application of the same principle on which the court then proceeded. The object of the plaintiff in this court, in joining both actions in one bill, is plainly to delay and embarrass the defendant. His answer may be a complete discovery as to all sought in defence of one of the actions; yet the bill is so framed as to delay the trial of that action till the return of the commission. The actions at law are met by separate pleas, averring the truth of the separate allegations. If separate commissions are to issue as to each action, there can be no reason for mixing up both in the same bill.

The *Solicitor General*, Mr. *Sugden*, and Mr. *Wakefield*, for the bill:—The question now raised is, whether a person in the situation of this plaintiff is, as against one and the same defendant, to be compelled to file two separate bills?

At law different felonies and different torts as between the same parties [\*84] may be joined in one indictment or action. It \*would be a reproach to courts of equity if they compelled a plaintiff to file two separate bills

(a) 5 Madd. 218.

(b) 5 Madd. 146.

(c) Ante, vol. I. 108.

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as to matters which might be joined in one action at law. Such a case as this does not come within the definition of multifariousness, in Lord Redesdale's Treatise. He defines it to be, (d) "to demand by one bill several matters of different natures against several defendants." One term of this definition is wanting here: there are not several defendants, but only one. And even if it be considered that there are several matters included in the same bill, they are matters of the same nature, and therefore not within the other term of the definition, which extends only to several matters of a different nature. It will be very difficult, if not impossible, to show any case in which, even where there are distinct matters included in the same bill, it has been held multifarious, if the parties were the same, or there was only one defendant. The policy of the court is against allowing suits to be split where the object can be attained by one bill. In *Purevoy v. Purevoy*, (e) the court expressed itself very strongly against the splitting of suits. *Kensington v. White*, (f) is a case much stronger than the present. There a bill was filed by seventy-four plaintiffs, who were underwriters, against various defendants, praying discovery and commissions in aid of a defence to four separate actions at law. The policies in that case were distinct, and made upon different voyages. But the court of exchequer there held that the inconvenience in such cases, where the parties to all the actions were the same, was greater in compelling the defendants at law to split their case into separate bills, than in praying for several commissions in aid of the defence to separate actions. \*The whole course of authori- [\*85] ties is in favor of such bills, and it is every day's practice where underwriters are sued on policies to file such bills. Wherever the actions at law are of such a nature as that they could be consolidated, one bill in equity for discovery is enough, and such a bill may be maintained even before the actions are consolidated. In *Kensington v. White*, four of the actions had been tried separately. Where there are several actions at law by and against the same parties, of such a nature that there may be the same plea and the same judgment in each, the rule in the courts of law is to allow the actions to be consolidated. *Cecil v. Briggs*, (g) *Brown v. Dixon*. (h) The authorities and the rules of the courts of law on this point are accurately stated in Serjeant Williams' note, 2 Saunders, 117. It is a mistake to say that the actions brought by the defendant in this case are actions for libels. There can be no such actions. They are both actions on the case for damages in respect of injury alleged to be sustained from the publication of two paragraphs in the same newspaper, both relating to the same controversy.

The VICE-CHANCELLOR:—This bill is not framed upon the principle that distinct commissions should issue as to each action; but means to include the defence to both actions in the same commission or commissions. I remember no case in which this has been before attempted; and it would lead to manifest

(d) Mitf. Pl. 147, 3d edition.

(e) 1 Vern. 28.

(f) 3 Price, 164.

(g) 3 T. R. 639.

(h) 1 T. R. 274.

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 1824.—*Marsh v. Wells.*


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injustice. Whether the defendant might or might not have brought one action in respect of both the alleged libels is immaterial. He has, in fact, [\*86] brought two actions, and is entitled to call upon \*the plaintiffs in equity for a separate defence to each. But if the same commission is to furnish the defence for both actions, then the plaintiff at law is necessarily delayed from proceeding in either of the actions, until the defendants are prepared for their defence in both.

But there is still a more important consideration. The depositions taken upon the commission or commissions, must be published, and used at the trial of that one of the two actions which first takes place; though it may happen that the witnesses in the second action may come within the jurisdiction before the trial of such second action takes place: and, if that should not happen, yet the premature publication of this testimony, which is opposed to all the principles of the court, would be manifestly dangerous to truth and justice, upon the trial of the second action.

It is said, these inconveniences would be avoided by granting distinct commissions as to each action. I have already observed that this bill is not framed with that view. It is not, however, pretended that any such thing was ever done; but it is said the court may make a new precedent. At this time of day a judge would hesitate much before he made a new precedent; because the strong presumption is that a precedent is not to be found, not by reason that it never suited a plaintiff before to call for it, but because it was not consistent with the principles of the court.

If a bill could be, and were framed, so as to put a distinct case in issue upon each cause of action, still there would be this injustice to the defendant, [\*87] that he must wait for his costs upon the first commission until \*the return of the second; and all this novelty is to be introduced for no substantial advantage to the plaintiff, who would save but little by stating his distinct cases in the same bill, instead of stating them in separate bills.

The report of the case of *Kensington v. White* is too loose to afford any principle; and under-writing causes are not to be reasoned upon as furnishing general rules.

Demurrer allowed.[1]

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#### MARSH V. WELLS.

1824, 30th June.—*Waste.*—*Tenant for life and remainder-man.*

The reversioner of leaseholds, with the privity of the tenant for life, renewed the lease in his own name, and covenanted to repair the premises. Held that he was to be considered as having entered into the covenant on behalf of the tenant for life, and that the latter's estate was liable for dilapidations occasioned by his neglecting to repair.

[1] Vide *Knye v. Moore*, 1 Sim. & Stu. 65, and note, *ibid*.

1824.—*Marsh v. Wells.*

**ELIZABETH BAYNARD** by her will gave her freehold and leasehold estates, the latter of which she held under a lease for twenty-one years from the dean and chapter of Rochester, to William Pemble and Rachael his wife, for their lives, and the life of the survivor of them; and she gave all her estate, both freehold and personal, to George Marsh, the plaintiff's father, his heirs, executors, administrators and assigns, and appointed him and the plaintiff executors of her will. The testatrix died in the year 1797. Upon her decease William Pemble entered into the possession of the freehold and leasehold estates, and continued in such possession until his decease. In the year 1798, seven years of the term of twenty-one years being expired, a renewed lease was, with Pemble's consent, taken in the names of the plaintiff and his father. In 1800, the plaintiff's father died, having devised and bequeathed all his real and personal estate to the plaintiff, and appointed him his executor. In the year 1805, 1812, and 1819, renewed leases were taken, with Pemble's consent, in the plaintiff's name, and the plaintiff covenanted \*to keep the buildings and [\*88] fences on the premises in repair. Upon every renewal, Pemble and the plaintiff paid the fine, in certain proportions agreed upon between them. In 1823 Pemble died intestate: the defendants were his administrators.

Some years before his decease the plaintiff had informed him, by letter, that he expected the freehold estate to be kept in proper tenantable repair, and requested him to consider that communication as due notice thereof. Pemble's solicitor answered this letter, and said that Pemble accepted it as legal notice respecting the repairs of the freehold estate, and would give due attention to it; but, notwithstanding, both the freehold and leasehold estates were, at Pemble's decease, in a dilapidated state. In consequence of this, a meeting took place between the plaintiff and the defendants, at which a surveyor was appointed on each side to ascertain the expense of making the necessary repairs, with power to them to appoint an umpire. The surveyors accordingly appointed an umpire, but, before any survey was made, the defendants revoked the authority given to their surveyor and the umpire, upon which the plaintiff's surveyor and the umpire proceeded to survey the buildings and fences, and estimated the expense of the repairs at 630*l.* 10*s.* and made a report to that effect.

The bill, after stating as above, prayed that it might be declared, that the plaintiff was entitled to a compensation out of Pemble's personal estate, for the repairs which Pemble ought to have done upon the freehold and leasehold estates, and that it might be referred to the master to inquire and state what sums would be necessary for putting the estates into a tenantable and proper state \*of repair, and that such sums might be ordered to be paid [\*89] to the plaintiff out of Pemble's personal estate.

To this bill the defendants put in a general demurrer for want of equity.

**Mr. Koe** in support of the demurrer:—This is not like the case of a tenant for life benefiting himself by the commission of waste, as by cutting timber.

1824.—*Marsh v. Wells.*

This in a mere case of permissive waste. There are many cases that show that the executors of a person who has been guilty of permissive waste are not liable. *Gibson v. Wells*,<sup>(a)</sup> *Herne v. Bembow*,<sup>(b)</sup> *Turner v. Buck*,<sup>(c)</sup> *Lansdowne v. Lansdowne*.<sup>(d)</sup> It was optional on the part of the plaintiff to take the renewed leases. He could not have compelled the tenant for life to take them: but he considered the renewing of the leases to be for his own benefit.

Mr. Sugden and Mr. Wilbraham in support of the bill :—The plaintiff in this case was, during the life of the tenant for life, a trustee only. The rents were received by the tenant for life. The plaintiff, upon taking the renewals, entered into onerous covenants to perform certain obligations, not for the benefit of himself alone, but for the benefit and with the privity of the tenant for life. Those covenants were broken during the possession of the tenant for life. Then ought not his estate to defray part of the damages? Suppose that, instead of having a partial interest, he had been entitled to this property absolutely, and the plaintiff had entered into the covenants, he must [\*90] have indemnified the plaintiff \*for any damages sustained by breach of the covenants, before he could call for an assignment. What difference can it make in this respect, whether he is entitled to the entire or the absolute interest in the property? The covenants were entered into by the plaintiff as a trustee; and, as it was done with the privity and consent of the tenant for life, they were in equity his covenants, and might have been enforced against him. The case of *Turner v. Buck* was decided upon the ground that the jointress had entered into no covenant to repair; here there was such a covenant.

This bill charges that the defendants did acquiesce in the plaintiff's demand, and appointed a surveyor to meet the one appointed by the plaintiff, and that they had a meeting, but that the defendants afterwards revoked their appointment. This part of the case calls for an answer; and the demurrer must be overruled upon this as well as upon the ground before stated.

The VICE-CHANCELLOR :—The plaintiff, during the life of W. Pemble, was, in effect, the trustee of these premises for W. Pemble, and was so constituted by his consent. The covenant of the defendant to keep the premises in repair is, during the life of W. Pemble, to be considered as entered into by the plaintiff on the behalf and at the request of W. Pemble; and the plaintiff is plainly therefore entitled to be indemnified out of the assets of W. Pemble for W. Pemble's breach of that covenant. It can make no difference in this principle, that the plaintiff upon the death of W. Pemble became entitled to the beneficial interest in the remainder of the lease.

Demurrer overruled.

(a) 1 New. Rep. 290.

(c) 22 Vin. Ab. 523.

(b) 4 Taunt 764; see also *Jones v. Hill*, 7 Taunt. 392.

(d) 1 J. & W. 522.

1824.—Weld v. Bonham.

## \*WELD v. BONHAM.

[\*91]

1824, 30th June.—*Pleading.—Parties.*

A bill to carry the trusts of a creditor's deed into execution, may be filed on behalf of all the creditors by one of them only, where they all executed the deed but were very numerous.

THE bill was filed by Weld and Louthier, on behalf of themselves and all other the joint and separate creditors of Bell and Wilkinson, against Bonham, Barclay and Rowcroft, who were trustees for payment of Bell and Wilkinson's debts, and against Bell and Wilkinson themselves.

It stated that in 1819 Wilkinson became indebted to the plaintiffs, who were then in partnership as tailors, on his separate account, in 123*l*. for goods sold and delivered: that Wilkinson and Bell were then in partnership as merchants and ship owners: that they afterwards became insolvent: that a deed dated the 27th of June 1820, was made between Bell and Wilkinson of the 1st part, one Adam Bell of the 2d part, the persons whose names were subscribed and seals affixed, (being creditors of Bell and Wilkinson) of the 3d part, and Bonham, Barclay and Rowcroft, of the 4th part; by which Bell and Wilkinson covenanted with Bonham, Barclay and Rowcroft to do all necessary acts for vesting their joint and separate estates in Bonham, Barclay and Rowcroft, and to enable them to convert such estates into money; and it was thereby covenanted, between all the parties to the deed, that Bonham, Barclay and Rowcroft should stand possessed of the moneys which they should receive by such conversion, upon trust to distribute the same amongst the joint and separate creditors, in such shares, order and course of priority as they, with reference to the nature and amount of the claims and securities of the creditors, should think proper. The \*bill further stated that, in [\*92] pursuance of the trusts of this deed, the trustees had taken possession of the joint and separate estate, but had not applied it according to the trusts but had paid it over to Bell and Wilkinson, and had thereby been guilty of a breach of trust. It prayed for an account of the joint and separate estates possessed by the trustees; that they might be held personally responsible for such parts as they had paid over to Bell and Wilkinson; and that the estates of Bell and Wilkinson might be applied, in pursuance of the trusts of the deed, in payment of the debts due to the plaintiffs and the other joint and separate creditors.

The defendants Bonham and Barclay demurred to the bill, because the persons who were parties to the deed of the 3d part were not made defendants to it.

Mr. Tinney, in support of the demurrer, said that all the creditors were not made parties to the bill, although they were scheduled creditors, and parties to the deed; and that no reason was stated for the omission. He admitted that the bill was filed by the plaintiffs on behalf of all the creditors; but he said that some of them were joint and others separate creditors; and that one at

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 1824.—Attorney General v. Comber.
 

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least of each class ought to have been brought before the court, and he cited *Cockburn v. Thompson*.(a)

Mr. *Lynch* supported the bill; and, in answer to a question put by the Vice-Chancellor, said that there was no allegation in the bill that the creditors were numerous, but that they appeared to be so by the deed.

[\*93] \*The VICE-CHANCELLOR :—I am of opinion that it was not necessary to make a joint creditor of A. and B., or a separate creditor of A. a party to this suit, and that the plaintiff being a separate creditor of B. is entitled to represent all who claim under this deed, although they do not all claim in the same order. If there be special circumstances in this case which make it fit that the joint creditors of A. and B., or the separate creditors of A., should be more distinctly represented in taking the accounts before the master, a proper application must be made to the court for that purpose after the decree. With respect to the objection that the plaintiff has not alleged that the parties to the deed are numerous, the court being, from the statement of the deed in the bill, virtually in the possession of the deed and its schedule, sees for itself that the parties are much too numerous to make it practicable to prosecute a suit, if they are all made parties.[1]

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#### ATTORNEY GENERAL v. COMBER.

1824, 1 and 3 July.—*Charity*.

Bequest to the widows and orphans of the parish of L. held a good charitable bequest.

JOSEPH COMBER by his will bequeathed as follows :—"Whatsoever there may be from the property now in chancery belonging to the late Cleophus Comber, my father, now to me, one fourth to my uncle William Kelsey, one fourth to the widows and orphans of the parish of Lindfield, Sussex, the remaining half to my uncle Charles Comber."

The information in this case prayed that it might be declared that this [\*94] bequest to the widows and orphans \*of the parish of Lindfield, was a valid bequest to a charitable use. It appeared that the amount of the property was likely to be so very small that, if the charitable bequest were held to be good, it could not be enough to form a permanent fund, but must be the subject of immediate distribution.

Mr. *Hart* and Mr. *Cooper*, for the information, cited *Attorney General v. Peacock*,(b) *Attorney General v. Clark*,(c) *West v. Knight*.(d)

Mr. *Horne*, Mr. *Sugden*, and Mr. *Ching*, for the defendant, insisted that it

(a) 16 Ves. 321. See also *Meux v. Maltby*, 2 Swans. 277. *Weale v. West Middx. Waterworks Compy.* 1 J. & W. 358, and *Baldwin v. Lawrence*, ante.

(b) Finch. 245.

(c) Amb. 422.

(d) 1 Cha. Ca. 134.

[1] Vide ante 26, and note, *ibid*.

1824.—*Newsome v. Shearman.*

was not a personal gift to the widows and orphans, and that the description of the persons was too general and uncertain.

The VICE-CHANCELLOR :—A gift to the widows and orphans of the parish of Lindfield, could not in its nature have proceeded from motives of personal bounty to particular individuals ; it must have proceeded from general benevolence towards two classes of persons who were suffering under a common circumstance of destitution or privation, and is necessarily to be confined to such of those two classes who are within the scope of general benevolence. I must act upon this bequest, as if the expression had been to the poor widows and orphans of Lindfield. Declare this to be a charitable use.

This court doth declare that the specific bequest of the fourth part of the property, mentioned in the testator's will, to the widows and orphans of the parish of \*Lindfield, Sussex, is a good charitable bequest, and [\*95] doth order and decree that it be referred to Mr. Dowdeswell, one of the masters of this court, to inquire of what such property consisted, and to take an account of such part thereof as hath come to the hands of the defendant Comber, or any person or persons by his order, or for his use, and to ascertain the value thereof ; and in order thereto the parties are to produce before the said master, upon oath, all books, &c. And it is ordered, that the said master do appoint proper persons, belonging to the parish of Lindfield, to be the trustees of the charity fund. Further directions and costs reserved.[1]

Reg. Lib. A. 1823, f. 1651.

NEWSOME V. SHEARMAN.

1824, 2d July.—*Practies.*

Where a decree orders the defendant to retain his costs, when taxed, out of the balance in his hands, and pay the residue into court, if the defendant delay to get his costs taxed, the plaintiff must move that he may bring in his bill of costs to be taxed within a limited time, and not that he may pay in the whole balance.

By the decree on further directions, it was ordered that the master should tax the defendant his costs, and that the defendant should retain them out of the balance certified by the master to be in his hands, and pay the residue into the bank to the credit of the cause. Under this decree the defendant had been twice served with a warrant to bring in his costs to be taxed, but without effect.

Mr. Roupell, for the plaintiff, now moved that the defendant might be ordered to pay the whole of the balance into the bank. But the Vice-Chancellor refused the motion, saying that it sought to alter the decree made upon further

[1] Vide *Wellbeloved v. Jones*, 1 Sim. & Stu. 40.



1824.—Fairfield v. Weston.

directions, and that the proper course was, to move that the defendant might, within a limited time, bring in his bill of costs to be taxed.

[\*96]

\*FAIRFIELD v. WESTON.

1824, 5th July.—*Timber.*

Whether the grantor of an annuity, charged upon the rents and profits of an estate, with the usual demise to a trustee, has a right to cut timber for his own use and profit, the estate being inadequate to the payment of the charges upon it.—*Quere.*

THE plaintiff was entitled to an annuity granted to him by the defendant Weston, and charged upon certain estates, part of which was described as woodland, of which Weston was tenant for life, unimpeachable of waste, and further secured by a demise of the estate to a trustee for a term of years. The bill was filed against Weston and the other incumbrancers on the estate, whose charges were subsequent to the plaintiff's. After an order obtained by the plaintiff for the appointment of a receiver, the defendant Weston, who was abroad, through the intervention of an agent, sold some timber standing upon the estate, to George Marshall, who proceeded to cut it. A supplemental bill was filed against Marshall for an injunction to restrain him from carrying off the timber already cut, and from cutting any more timber. It appeared that the yearly amount of the various incumbrances on the estate considerably exceeded the yearly rents and profits. A motion was now made for the injunction, and also for a reference to the master, to inquire whether it was for the benefit of the incumbrancers that the contract with Marshall should be performed; and, if the master should be of opinion that the contract should be performed, then that Marshall might proceed in the cutting of timber according to his contract, on his undertaking to pay the price into court to the credit of the cause.

Mr. Ching for the motion.

Mr. Sugden and Mr. Witham, for the defendant Weston, insisted that the rents and profits upon which the annuity was charged did not include the [\*97] profits of the \*timber, and the right to cut and sell timber remained in the defendant Weston.

Mr. Merivale, Mr. Parker, Mr. Lynch, and Mr. Richards, for the other parties.

The cases cited as to the right to cut timber, were *Bray v. Tracy*, (a) *Newdigate's case*, (b) *Gill v. Pindon*, (c) *Comyns' Digest*, (d) *Davis v. Duke of Marlborough*. (e)

The VICE-CHANCELLOR :—The question is not whether the annuitant or the trustee of his term has a right to cut timber; but whether, the timber being

(a) Sir W. Jones, 51. (b) Moor, 72. (c) Cary, 90. (d) Waste (C. 5.) (e) 2 Swan. 131.

1824.—Noel v. Lord Walsingham.

cut by the grantor, the annuitant has, or not, a right to be paid out of the price, as a part of the profit of the estate charged with the annuity. The trustee not being unimpeachable of waste clearly cannot, as a termor, cut the timber. I rather apprehend that the general charge of the annuity upon the rents and profits of the estate would include the profits of timber, unless the word profits is upon the whole deed, having reference to the uses of the term, to receive here a more limited sense. But this is not the proper season to enter more fully into this question.

The receiver is, as between the parties to the suit, to be considered as appointed from the date of the order of reference to the master; and after the date of that order the defendant Weston was not at liberty to \*ex- [\*98] ercise any right of ownership upon the estate, without the authority of the court. The interest of the incumbrancers requires that Marshall should be at liberty to proceed in the cutting of the timber: but I will secure the price in order that the right to the value may be decided upon the hearing of the supplemental suit.

By an arrangement between the parties Marshall undertook to pay the price of the timber into court.

"All parties by their counsel waiving the inquiry whether the contract for the sale of timber, entered into by the defendant J. W. Weston, by his agent, and in the pleadings mentioned, is a fair contract, and such as ought to be carried into effect, this court doth order that the defendant, George Marshall be at liberty to remove the rest of the oak timber trees felled and now remaining in and upon the estates and premises in the pleadings mentioned, with the bark, lops, and tops thereof; and it is ordered that the said George Marshall do pay the amount of the valuation of the timber, in the pleadings mentioned making the deduction allowed by the contract in case of payment before the 29th of September next, the residue of such amount to be verified by affidavit, into the bank, with the privity of the accountant general in trust in this cause, &c."

Reg. Lib. A. 1823. f. 1542.

\*NOEL v. LORD WALSHINGHAM.

[\*99]

1824, 5th July.—*Portions.*—*Satisfaction.*

A father being tenant for life under his marriage settlement with power to appoint the shares in which his younger children were to take a sum to be raised for their portions, having exercised the power by his will, afterwards made a provision for one of his daughters, took a release from her of her portion, and by a codicil revoked the appointment in his will, so far as it respected her. Held that her share did not sink into the freehold, or belong to his residuary legates, but that the other younger children were entitled to the whole fund.

By the marriage settlement of Paul Cobb Methuen, Esq. the father of the plaintiff Mrs. Noel, dated in April 1776, certain manors and other heredita-

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 1824.—Noel v. Lord Walsingham.
 

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ments in the counties of Wilts, Gloucester and Somerset, were conveyed to the use of Paul Cobb Methuen during his natural life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of certain other trustees, for the term of five hundred years, and, subject thereto, to the use of the first and other sons of the marriage successively in tail male, with divers remainders over. The trusts of the term of five hundred years were, in case there should be two or more children of the marriage other than an eldest or only son, to raise the sum of 15,000*l.* for their portions, in such shares and proportions as Paul Cobb Methuen should, by any writing under his hand and seal, or by his last will and testament, or any codicil thereto, appoint, and, in default of such appointment, to be equally divided amongst them; the shares to become vested at the usual periods, but not to be payable until six months after the decease of Paul Cobb Methuen, and then to be paid with interest from his death after the rate of four per cent. per annum, and not sooner, unless Paul Cobb Methuen should by writing under his hand direct such portions, or any part thereof, to be raised and paid in his lifetime. Provided that, if Paul Cobb Methuen should in his lifetime give or advance unto or for any child or children of the marriage entitled to portions, under the trusts of the term of five hundred years, any sum or sums of money, lands, tenements, goods or chattels for or towards the ad-  
 [\*100] vancement \*and preferment of such child or children respectively in marriage, or otherwise, then such sum and sums of money, and the value of such lands, tenements, goods and chattels, should be, and be deemed, accounted and taken as and for part, if less, and, if as much or more, for the whole of the portions and provisions before provided and appointed to be raised to and for him, her or them respectively, unless Paul Cobb Methuen should by writing under his hand signify and declare the contrary.

There was issue of the marriage four sons and five daughters; (that is to say,) the defendant Paul Methuen the eldest son, Charles Lucas Methuen, John Andrew Methuen, Matilda Lady Walsingham, Catherine Matilda Plumtree, the Rev. Thomas Anthony Methuen, the plaintiff Cecilia Penelope Noel, Gertrude Grace O'Bryen and Ann Christian Methuen.

Paul Methuen, the father of Paul Cobb Methuen, by his will dated the 10th of April 1793, devised certain manors and hereditaments to trustees, upon trust, upon the request of Paul Cobb Methuen, to sell and dispose thereof, and upon the receipt of the purchase money, to pay the sum of 20,000*l.* amongst the younger sons of Paul Cobb Methuen, in case they should attain the age of twenty-one years, in such shares as Paul Cobb Methuen should think fitting; and he thereby declared that the 20,000*l.* when so paid to such younger sons, should be accepted by them in full satisfaction of their shares of the sum of 15,000*l.* provided for the portions of the younger children of Paul Cobb Methuen by his marriage settlement, and that the 15,000*l.* should then be left to be shared amongst his remaining younger children.

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In 1795 the testator died.

\*Previous to the marriage of Lord and Lady Walsingham, Paul [\*101] Cobb Methuen, by an indenture dated the 12th of May 1804, appointed that the sum of 3,000*l.* should be Lady Walsingham's share of the 15,000*l.*

By a deed-poll, dated the 17th of May 1804, and executed by Lord and Lady Walsingham and Paul Cobb Methuen, in consideration of certain sums of money having been advanced and paid, or secured to be paid, by Paul Cobb Methuen on Lady Walsingham's marriage, to her husband and the trustees of her marriage settlement, the sum of 3,000*l.* so appointed in favor of Lady Walsingham, and all interest she or her husband might claim in respect thereof, was assigned to Paul Cobb Methuen, his executors, administrators and assigns, absolutely.

And Christian Methuen died intestate in the lifetime of her father, having previously attained the age of twenty-one years; and the defendant Paul Methuen, after his father's decease, took out letters of administration to her estate.

Paul Cobb Methuen, by his will dated the 12th of October 1809, directed the estates and hereditaments out of which the 20,000*l.* was to be raised, to be sold, and the trustees to stand possessed of the purchase money upon trust, as to the sum of 1,000*l.* part thereof, for his second son Thomas Anthony Methuen, his executors, administrators and assigns, to be paid immediately after his decease; and, as to the sum of 2,000*l.*, in trust for his third son Charles Lucas Methuen; and, as to the sum of 10,000*l.*, in trust for his youngest son John Andrew Methuen. And he thereby directed, in further pursuance

\*of the will of Paul Methuen, that the 15,000*l.* by his marriage settle- [\*102] ment directed to be raised and paid unto his younger children, should be paid to his daughters only, except Lady Walsingham (and to whom on her marriage he had paid the sum of 7,000*l.* in lieu of any share she might have been entitled to of the sum of 15,000*l.*) in equal shares and proportions, and in such manner as the same was directed to be paid to his younger children by his settlement.

By a deed-poll dated the 15th of June 1813, Thomas Anthony Methuen, in consideration of a sum of money advanced and secured to him by Paul Cobb Methuen, released unto Paul Cobb Methuen and his heirs all his right, title and interest in and to the manors and other hereditaments comprised in the settlement and will of Paul Methuen, and charged with the payment of his portion as one of the younger children of Paul Cobb Methuen.

By a deed-poll dated the 31st of March 1815, Gertrude Grace Methuen, afterwards Lady Edward O'Bryen, in consideration of 10,000*l.* secured for her by Paul Cobb Methuen, released to Paul Cobb Methuen and his heirs all her right, title and interest in or to the manors and hereditaments comprised in the settlement charged with the payment of her portion as one of the younger children of Paul Cobb Methuen; so that neither she, her heirs, executors, administrators or assigns, nor any other person or persons in trust for her or

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them, or in her or their name or names, or in the name, right or stead of her or any of them, might, by virtue of such indentures, or by any other ways or means whatsoever, thereafter have or demand any right, title or interest of, in, to \*or out of the same manors, messuages, lands or hereditaments in respect of her share or proportion of such sum or sums of money so directed to be raised for such provision as aforesaid, but that she, her heirs, executors, administrators or assigns, and every of them, and all and every person or persons whomsoever claiming by, from, through or under her or them, from all estate, right, title, property, claim or demand, of, in, to or out of the same manors, messuages, lands, hereditaments and premises, or any of them, or any part thereof, should be thereby for ever excluded and debarred.

Paul Cobb Methuen made a codicil to his will, dated the 1st of April 1815; and, after reciting his will, and an indenture, whereby, in contemplation of the then intended marriage between his daughter Gertrude Grace with Lord Edward O'Bryen, 10,000*l.* had been paid to her, or for her benefit, as a marriage portion, he, in consideration of such provision so made for his daughter Gertrude Grace, did thereby revoke, annul and make void the direction and appointment so by him before made in and by his will or otherwise, with respect to the sum of 15,000*l.* so far only as respected his daughter Gertrude Grace and her share or proportion of the same respectively, but not further or otherwise with respect to his other daughters, except Lady Walsingham.

Paul Cobb Methuen died sometime in the year 1816; and, after his decease, administration, with his will and codicil annexed, was granted to the defendant Paul Methuen, his eldest son, and residuary legatee.

Mrs. Noel and Mrs. Plumptree married after their father's death.

[\*104] \*The bill charged that, under the circumstances before stated, the plaintiff, Mrs. Noel, became entitled to share with her sister Mrs. Plumptree, in the whole of the 15,000*l.*, together with interest after the rate of four per cent. per annum from the decease of Paul Cobb Methuen, in equal moieties: and it prayed that the trustees of the term of five hundred years might be directed to raise the 15,000*l.* in pursuance of the trusts of the settlement; and that Mrs. Noel might be decreed to be entitled to a moiety of that sum, with interest after the rate of four per cent. from her father's decease.

The defendant Paul Methuen, by his answer, submitted that Mrs. Noel was not entitled to share with Mrs. Plumptree in the 15,000*l.*, in equal moieties, for that Thomas Anthony Methuen, not having received an adequate or reasonable share with his other younger brothers out of the 20,000*l.* nor having made any election to accept that provision in lieu of the provision made for him by the settlement, was entitled to share with his four sisters in the 12,000*l.*, being so much of the 15,000*l.* as remained after the appointment of the 3,000*l.* to Lady Walsingham; and that, being so entitled, Thomas Anthony Methuen, in consideration of a sum of money advanced to him by Paul Cobb Methuen, by the deed-poll of the 15th day of June 1813, assigned to Paul Cobb Methuen all his right and interest both in the 20,000*l.*

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and 15,000*l.*, and that thereupon the same fell into and formed part of Paul Cobb Methuen's residuary personal estate, and then belonged to him the defendant Paul Methuen as Paul Cobb Methuen's executor and residuary legatee. And he insisted that, in consequence of the release or assignment made by Lady Edward O'Bryen to Paul Cobb Methuen, and also of the revocation contained in the codicil as to her share, Mrs. Noel and Mrs. Plumtree \*became entitled to two-thirds only of the 3,000*l.* in equal shares, and [\*105] that the remaining third, in consequence of the revocation contained in the codicil, fell into the residue of the testator's personal estate; and that, as to the sum of 12,000*l.*, two-thirds thereof, after deducting 2,400*l.*, the share of Thomas Anthony Methuen, were divisible between Mrs. Noel and Mrs. Plumtree in equal shares; and that, of the remaining 3,200*l.*, 2,400*l.* being the amount of the original share of Lady Edward O'Bryen, by virtue of the release or assignment became the property of the testator, and fell into the residue of his personal estate, to which he the defendant Paul Methuen was entitled as aforesaid; and that 800*l.* the remainder of the 12,000*l.*, being left altogether unappointed, became divisible between the personal representative of Paul Cobb Methuen, as the assignee of Thomas Anthony Methuen, Mrs. Plumtree, Mrs. Noel and the personal representative of Ann Christian Methuen, in equal shares.

The defendants Charles Lucas Methuen and John Andrew Methuen by their answer said that, in consequence of the appointment made to them by Paul Cobb Methuen, of the sums of 9,000*l.* and 10,000*l.* out of the 20,000*l.* bequeathed by the will of Paul Methuen, and which they had agreed to accept in lieu of their share in the provision made for them by the settlement, they claimed no right or interest in or to the 15,000*l.*

The defendant Paul Mildmay Methuen was the eldest son of the defendant Paul Methuen, and as such was entitled to the first estate of inheritance in the premises. He, by his answer, insisted that by virtue of the two deeds-poll or releases made by Thomas Anthony Methuen \*and Lady Ed- [\*106] ward O'Bryen, their shares in the 15,000*l.* were released to Paul Cobb Methuen, as the owner of the freehold of the hereditaments out of which that sum was to be raised; and that therefore those shares became wholly extinguished.

Mr. *Horne* and Mr. *Inman* for the plaintiffs.

Mr. *Sugden* and Mr. *Spurrier* for the defendant Paul Methuen:—The release taken from Lady Walsingham was, in effect, an assignment, though it certainly does contain words of release.(a) But it has all the operation of an assignment: and there would be no difficulty in this case but for the decision in *Folkes v. Western*.(b) According to the authority of that case, Paul Cobb

(a) The deed, as stated in the brief, was an assignment only.

(b) 9 *Ves.* 456. See Mr. *Sugden's* observations upon this case in his *Treatise of Powers*, p. 561, 3d ed.

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Methuen was incapable of purchasing, by advancement to his daughter, any share in the fund. The course frequently adopted upon the marriages of the younger members of a family, for whom portions are provided under their parent's settlement, is this, the father advances the amount of the portion and takes an assignment of the portion itself. If *Folkes v. Western* were carried to its full extent, it would prevent a father from advancing a child his portion. But that case is not law; and, so far as regards the argument on the uncertainty of the share, the decision is clearly founded in error. The child there had a vested interest in the fund, subject only to the power of [\*107] appointment. What \*the court would hold in such a case would probably be, that the share of the child bargained for by the father, is the vested share of the child, subject to the appointment. The case of *Pitt v. Jackson*, or *Smith v. Lord Camelford*,(c) is directly contrary to *Folkes v. Western*. Besides, that case differs from this in the following points: there the daughter's share was undefined; here it is defined by the appointment of the 12th of May 1804: there the father took no assignment of his daughter's portion, so that it remained for the court to say whether the advancement was or was not a satisfaction of the portion; here the father took an actual assignment of Lady Walsingham's portion, and thereby secured to himself the benefit of it.

In this view of the case there still remained 12,000*l.* of the original fund to be divided amongst the daughters. By his will he disposes of that sum, and of the 3,000*l.* which he had bought of Lady Walsingham.(d)

In June 1813, Thomas Anthony Methuen released all his right title and interest in the hereditaments charged with his portion to Paul Cobb Methuen and his heirs. The word "heirs" is used here incorrectly. For the heirs of this gentleman never could have any claim to this portion. But the son [\*108] meant by this \*release to give effect to the disposition made by his father's will.

The testator next makes a provision for Lady Edward O'Bryen, and takes a release from her of her portion under the settlement. He then, by his codicil, revokes the appointment made by his will, so far as it respected her. This revocation has the effect, either of giving that lady's share of the 15,000*l.* under the will to her two other sisters, Mrs. Noel and Mrs. Plumptree, or of wholly withdrawing it from the operation of the will. It is impossible to support the former of these propositions; for there are no words of gift in the codicil. The latter of them is therefore to be maintained; and the consequence is that Mr. Paul Methuen is entitled to the 5,000*l.* as undisposed of.

If the will and codicil were to be wholly disregarded Mr. Paul Methuen

(c) 2 Bro. C. C. 51, and 2 Ves. jun. 698.

(d) Does it not appear from Paul Cobb Methuen not keeping these sums distinct in his will, but mentioning them as one entire sum of 15,000*l.* by his marriage settlement provided and directed to be raised and paid amongst his younger children, that he did not consider himself as the purchaser of the 3,000*l.*?

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would be entitled to 6,000*l.* of the 15,000*l.*; for he would be entitled to one sum of 3,000*l.* as the purchaser of Lady Walsingham's share, and to another sum of the same amount, as the purchaser of Lady Edward O'Bryen's share. So that the least that he can be entitled to, in any view of the case, is 6,000*l.*

At all events, if these instruments are considered to operate as releases only of these portions. Mr. Paul Methuen is entitled to the benefit of them as tenant for life of the estates on which the portions were charged.

Sir *Griffin Wilson* and Mr. *Knight* for Paul Mildmay Methuen :—It is provided by the settlement that if the father should, in his lifetime, advance any of the children \*entitled to portions under it, such advance- [\*109] ment should be considered as a satisfaction of that child's portion, unless the father should declare the contrary in writing. Under that proviso, an advancement at once extinguishes the share of the advanced child, unless a declaration is made to the contrary.

If, therefore, Paul Cobb Methuen did not mean Lady Walsingham's share to sink into the freehold, he ought to have declared so, and not to have taken an assignment of it from her.

Supposing, however, that the assignment is considered as tantamount to such a declaration, then the question is whether Lady Edward O'Bryen's 5,000*l.* or any part of it, is to be raised. There is a marked distinction between the conduct of the father on Lady Walsingham's marriage and on Lady Edward O'Bryen's. On the former he makes an appointment of a share and takes an assignment of that share. On the latter he neither makes an appointment nor an assignment, but simply takes a release, as having an interest in the estate as tenant for life. If he intended to give, by the codicil, Lady Edward O'Bryen's share to his two other daughters, he could not do so, because it had been extinguished by the release. But he had no such intention. For if he had so intended he knew how to declare so, and would have done it, and not have simply revoked the appointment in her favor. We, therefore, contend that 5,000*l.* of the 15,000*l.* was extinguished.

Mr. *Roupell*, Mr. *Miller*, Mr. *Christie* and Mr. *Bunt*, appeared for the other defendants.

\*The VICE CHANCELLOR :—Mr. Paul Cobb Methuen became the purchaser of the 3,000*l.* which he had appointed to Lady Walsingham; and that sum, not being more than her equal aliquot share of the 15,000*l.*, it might be difficult to question the validity of that appointment or purchase, if the interest of any party required it; which does not happen to be the case. By the death of the daughter, Ann Christian, intestate, after she had attained twenty-one, Mr. Paul Cobb Methuen being entitled to administer to her, his executor could now have claimed her share in any part of the 15,000*l.* which, if unappointed, would have devolved upon her representative. Mr. Paul Cobb Methuen could not have appointed any share after her death to her representative, if he had not been entitled to fill that character himself. When Mr. Paul Cobb Me-



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thuen made his will in October 1809, he had full power to give the 15,000*l.* to his other daughters in exclusion of Lady Walsingham.

The only questions in the cause appear to me to arise upon the subsequent transactions with respect to Lady Edward O'Bryen's portion.

By the terms of the settlement any advance made by the father in his lifetime was to be taken in or towards satisfaction of the portion provided by the settlement for a younger child, unless the father should declare the contrary. I apprehend the true construction of this provision is that, if the father make an advance to an object of the settlement, without any declaration or intention in respect to it, the advance operates to the exoneration of the estate charged with the portion; but that the father is at liberty to declare that the child advanced shall, notwithstanding, receive its full portion; or is at [\*111] liberty to \*consider himself, *pro tanto*, the purchaser of the portion, and to declare, in effect, that it shall remain a charge upon the estate for his benefit. The question, then, with the settled estate is, whether Mr. Paul Cobb Methuen has declared any intention that, notwithstanding the advance made to Lady Edward O'Bryen, her share of the 15,000*l.* should continue a charge upon the settled estate, in order to remain at his disposition? I concur with the argument for the personal representative of Mr. Paul Cobb Methuen, that the deed-poll of Lord and Lady O'Bryen of the 31st March 1815, may, under the circumstances, be treated as an assignment of her interest in the 15,000*l.* to her father; and I take the true intent and effect of his codicil to be, not to leave one-third of the 15,000*l.* unappointed; but, as his will had given the 15,000*l.* equally between his daughters except Lady Walsingham, that the intention of the codicil was further to except Lady Edward O'Bryen, and to give the 15,000*l.* equally between the two other daughters, and the declaration of my decree will be accordingly.

I may add that, having carefully considered the case of Folkes and Western, I do not concur in the observation made at the bar, that there is error in that decree; inasmuch as it was not declared that the father was a purchaser of Mrs. Lloyd's share. There was, in that case, no expressed intention on the part of the father to that effect. I have more difficulty as to that part of the decree which declares that Mrs. Western, the mother, had lost her power of appointment. The settlement gave her, in the event which happened of her surviving her husband, a power to appoint the whole fund to any one child; and the act of the husband in providing a satisfaction for one child [\*112] could not, I think, deprive the widow of her \*power to appoint the whole fund to the only other child. And such appointment appears to me to have been necessary in order to enable the only other child to take the whole fund; for, there being in fact no appointment either by husband or wife in favor of any child, the consequence should seem to be, under the settlement, that Mrs. Strickland, the unprovided child, could take only a moiety of the unprovided fund, and that the other moiety, which by the terms of the

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settlement would vest in Mrs. Lloyd, the provided child, would sink for the benefit of the estate charged, if, as I think, the father could not be considered as a purchaser, but would otherwise be a part of the personal estate of the father. The case of *Boyle v. The Bishop of Peterborough*(c) bears strongly upon this view of the case.

\**MAVOR v. DRY.*(a)

[\*113]

1824, 23d & 30th July.—*Amendment.—Costs.*

Plaintiff by his original bill sought to set aside a deed. After the answer was filed he, under the usual order, amended the bill by making quite a different case, and sought to establish the deed. The court ordered him to pay the costs of the original bill and of certain accounts set forth in the answer in compliance with the prayer of that bill, and the costs of the motion.

In 1816 one Pyne projected a literary work to be published in numbers; but being unable, from want of funds, to carry his design into execution, he agreed with A. Dry, the late husband of the defendant, that they should become partners in the work; that Dry should find the capital, and Pyne, the labor and talent necessary to complete it; and that the profits should be shared equally between them. Several numbers of the work were published under this agreement; but before the work was completed the parties agreed to dissolve partnership. A deed dated the 30th of October 1818 was accordingly executed by them, by which the partnership was dissolved, and Pyne assigned to Dry his interest in the copyright and the other effects of the partnership; and it was agreed that Pyne should publish one of the remaining numbers at the end of every two months; that Dry should pay him 50*l.* on the publication of each number, and 500*l.* on the completion of the work, provided it should be finished on or before the 1st of July 1819. Dry died in April 1820, having appointed the defendant his executrix. In April 1822 a commission of bankrupt was issued against Pyne, and the plaintiff was chosen his assignee. The bill, after shortly noticing the deed of dissolution, insisted that it was void, as having been executed after the \*act of bankruptcy [\*114] on which the commission issued, and that the partnership continued till Pyne's bankruptcy, and prayed for an account of the copartnership dealings and transactions, and for such other relief as the plaintiff was entitled to, supposing the partnership to have continued as alleged by the bill.

The defendant in her answer insisted that the deed of dissolution was valid. But it appeared, by the accounts set forth in it, in compliance with the prayer

(c) 1 Ves. jun. 299; and 3 Bro. C. C. 243.

(a) From the end of Trin. term, in this year, until the 1st of November following, the Vice-Chancellor was compelled to discontinue his sittings by severe indisposition. During that interval the Master of the Rolls presided in the Vice-Chancellor's court.

1824.—*Mayor v. Dry.*

of the bill, that, assuming the deed of dissolution to be void and the partnership to have continued till Pyne's bankruptcy, there would be a balance of 500*l.* due to Dry's estate. Upon this the plaintiff obtained the common order to amend his bill, on payment of 20*s.* costs; and under that order he entirely varied the case made by his bill, and, after stating fully the deed of dissolution and treating it as valid, he prayed that it might be established and carried into effect.

The original bill consisted of 122 folios, 78 of which were omitted in the amended bill. The amended bill contained 126 folios.

The number of folios in the answer was 226, of which not more than 50 or 60 related to the contents of the amended bill.

The defendant now moved that the original bill might be dismissed with costs, and the amended bill be ordered to stand as the original bill; that the plaintiff might be ordered to pay to the defendant so much of the costs of the original bill and answer as had been incurred by her in consequence of the claim, made by the plaintiff in his original bill, to have an account [\*115] taken of the partnership dealings and transactions, and the \*consequent relief prayed respecting the same; and that such costs might be taxed; that till they were paid all further proceedings in the suit might be stayed, and that the plaintiff might be ordered to pay the costs of the motion.

Upon notice of this motion being given, the plaintiff's attorney made an affidavit, in which he deposed that, from the answer, although it appeared obvious to him that the suit as originally instituted might be prosecuted with success, it also appeared that, by amending the bill and seeking to establish the deed of dissolution set up by the answer, the bankrupt's estate would be thereby benefited; inasmuch as it appeared to him, from the answer, that the consideration moneys therein mentioned to have been paid to the bankrupt had not been paid, but that a considerable portion thereof still remained owing, and that no matter was inserted either in the original or amended bill which was foreign or immaterial to the plaintiff's case, or for any other purpose save the legitimate objects of the suit.

Mr. *Heald* and Mr. *Whitmarsh*, in support of the motion, cited *Smith v. Smith*,<sup>(a)</sup> and said that in that case the defendant had miscarried by taking a step in the cause before he made the motion; but that that was not the case here: and they also referred to *Dent v. Wardel*,<sup>(b)</sup> and *Watts v. Manning*.<sup>(c)</sup>

Mr. *Horne* and Mr. *Bridgman* for the plaintiff:—No such motion was ever made as that an amended bill should stand as an original one. If the court should dismiss the original bill, what would become of the answer to [\*116] it? The original and the amended bill form \*but one record, and your lordship cannot dismiss the former and retain the latter. In *Smith v. Smith* an order in the nature of a decretal order had been made. The

(a) *Coop.* 141.(b) 1 *Dick.* 339.(c) *Ante*, vol. I. 421.

1824.—*Reynolds v. Blake.*

merits of that case had been before the court, and the plaintiff by amending his bill attempted to make a new case, varying not only from that made by the original bill, but also from the issue directed by the court. In order to entitle the defendant to extra costs, a case of particular oppression must be shown: *Earl of Masserene v. Lyndon*.(d) No such case has been made out here. The plaintiff was a trustee for himself and the other creditors of the bankrupt, and finding, from the answer, that it would be more beneficial for himself and those with whose interests he was entrusted, that the deed should be established than that it should be set aside, he would not have done his duty unless he had amended his bill with a view to the attainment of that object.

The MASTER OF THE ROLLS:—The rule that the plaintiff shall pay 20s. costs only on amending his bill, does not bind the court where there has been great oppression and vexation. This appears to me to be a case of that nature. The original bill sought to set aside the deed of dissolution. To that bill Mrs. Dry put in a long answer insisting on that deed. It is clear that the plaintiff saw that if he went on with the suit his bill would be dismissed. He then alters the whole form of the bill, and seeks relief on the foundation of the deed.[1] There may be cases in which, on the coming in of the answer, it may be necessary to make very material alterations in the bill, on account of disclosures made by the answer. But that was not the case here. For it appears that the \*plaintiff was aware of this [\*117] deed of dissolution, and of the circumstances under which it was executed at the time of filing the original bill, for he notices it in that bill. I think that this case is within the principle of the decision in *Bent v. Wardel*; and I shall therefore give the defendant the costs of the original bill, and of so much of the answer as relates to the accounts of the partnership, and also the costs of this motion.[2]

#### REYNOLDS v. BLAKE.

1824, 15th August.—*Vender and purchaser.—Costs.*

If the master reports against the title to an estate purchased under a decree, the purchaser will be paid the costs of the reference out of the funds in the cause.

ONE Chandler, having opened the biddings for lot 1 of the estates sold under the decree in this cause, and paid a deposit of 40*l.*, was declared the purchaser of it at the re-sale. The master, upon the title being referred to him, reported

(d) 2 Bro. C. C. 291.

[1] A plaintiff may vary his case by an amended bill. *Peed v. Cussen and others*, Sausse & Scully, 161. *Magdalen College v. Sibthorp*, 1 Russell, 154; *Sadler v. Lovatt*, 1 Molloy, 162. But he cannot avail himself of a title acquired subsequent to the filing of the original bill. *Pilkingten v. Wignall*, 2 Madd. 240.

[2] A similar order was made in *Strickland v. Strickland*, 3 Beav. 242. A demurrer does not lie to an amended bill for referring throughout to the original bill, and repeating its entire contents and prayer. *Peed v. Cussen and others*, Sausse & Scully, 161.

1824.—Long v. Long.

against it. Chandler afterwards died. His executors now moved that the accountant-general might be directed, out of a sum of cash standing in his name to the credit of the cause, to pay to them the deposit; and that it might be referred to the master to tax their costs and the costs of the motion, and that the same when taxed might be directed to be paid to them by the plaintiff.

Mr. Turner, in support of the motion, cited *Fielder v. Higginson*,<sup>(a)</sup> and said that on reference to the register's book, it appeared that the purchase in that case was made under the decree.

Mr. Knight for the parties in the cause:—Each case must depend [\*118] upon its own peculiar \*circumstances. If this had been a bill for specific performance, it would not have been of course that if the vendor failed in making a good title the purchaser could get his costs. The title of part of the lot was under a mortgage for a long term of years, which had not been foreclosed; and the master was of opinion that the equity of redemption was not barred by length of time, and for that reason reported against the title.

The Master of the Rolls ordered the deposit, and the costs of the reference of the title and of the motion, to be paid out of the cash standing in the accountant general's name to the credit of the cause.<sup>(b)</sup>

[\*119]

\*LONG v. LONG.

1823, 23d November, 1824, 11th May and 9th November.—*Ward of court.—Settlement.—Jurisdiction.*

A lady entitled to a fund in court, married the day after she came of age. After the marriage a settlement of her property was made on her and her husband for their lives, and on the children of the marriage absolutely; but the wife never consented in court to a transfer of the fund to the trustees. After the husband's death, and the birth of a child, the settlement was, at the suit of the wife, declared void, because it contained no provision for a second marriage, and because the rights acquired by the husband were, on account of the precipitation of the marriage, a surprise on the wife.

JANE LONG, being entitled to several sums of stock, partly in possession, partly in reversion, and partly contingent, which had been transferred into the accountant-general's name under the decree in a suit for the administration of her late father's assets and for carrying the trusts of his will into execution, married on the day after she came of age. No settlement was ever made by the husband: but about three weeks after the marriage the whole of the wife's property (except 1,743*l.* 14*s.* 11*d.* stock, which was agreed to be transferred to the husband for his own use,) was assigned to trustees upon trust to pay 100*l.* a year to Mrs. Long for her life, for her separate use, and the remainder of the dividends to Mr. and Mrs. Long for their lives successively, and, after

(a) 3 V. & B. 142.

(b) See *Leckmeyer v. Braiser*, 2 J. & W. 287. [*Smith v. Nelson*, post, 557.]

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the decease of the survivor, to stand possessed of the capital for the children of the marriage; and, in default of such children, in trust for Mrs. Long, if she should survive her husband, but if not, then in trust for such person as she should by will appoint, and, in default of appointment, in trust for Mrs. Long absolutely.

A fortnight after the date of the settlement an order was made, upon a petition presented by Mr. and Mrs. Long and others in the suit before mentioned, that the \*sums of stock to which Mrs. Long was entitled [\*120] in possession should, after the transfer of the 1,743*l.* 14*s.* 11*d.* stock, be carried over, in trust in that suit, to the settlement account; and, it having been suggested to the court, at the hearing of this petition, that there was some question whether there had not been an agreement for a settlement prior to the marriage which bound the husband's interest in the wife's fortune, it was, by the same order, referred to the master to inquire whether there had or had not been any such agreement, and whether any settlement had been executed conformably thereto.

About six months after the marriage, and before the master made his report, the husband died, leaving his wife *enseinte*; and on the 30th of May 1822 she was delivered of a daughter.

The master made his report on the 6th of February 1823, and thereby certified that there was no agreement for a settlement prior to the marriage, which bound the husband's interest in his wife's fortune.

After this report a bill was filed by the trustees of the settlement against Mrs. Long and her infant daughter, stating that it was contended, on the part of Mrs. Long, that the settlement, having been executed merely as a post-nuptial settlement of property solely moving from her, and which was then actually under the protection of the court, whilst she was under coverture, and without any valuable consideration or property settled moving from or on the part of her late husband, and the more valuable parts of such settled property being interests of a reversionary nature, and, in one instance, of a contingent nature, the settlement was not, \*or was not to be considered as [\*121] binding upon her; and that, at all events, she was entitled to have the same reformed, or a new settlement executed under the directions of the court; and praying that it might be referred to the master to inquire and certify whether, under all the circumstances which existed, the settlement was a fit and proper settlement to have been executed as to the fortune and property of Mrs. Long so remaining in the court, due regard being had to the particular nature of each species of such property; or whether, in his opinion, the same ought to be reformed, varied or altered; or whether a new settlement ought to be made in lieu thereof, in respect of the fortune and property of Mrs. Long then under the control or directions of the court, and that the same might be effectuated accordingly under the decree of the court.

On this cause coming on to be heard, the Vice-Chancellor said that this bill was properly filed by the trustees, provided the settlement were established;

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but, if the court should be of opinion that the settlement could not be sustained, it could only dismiss the bill; that, therefore, it would be better to file another bill to come on at the same time with the original cause, by which means the case would be put in such a shape that, upon the discussion of the merits between the mother and child, the court could make a decree settling their rights and that would be binding on them.

A cross-bill was accordingly filed by *Mrs. Long* against the trustees and her infant child, charging that, for the reasons stated in the original bill, the settlement ought to be declared void, and praying that it might be declared void accordingly.

[\*123] \*The original and cross causes now came on to be heard together.

*Mr. Heart* and *Mr. Beames*, for the plaintiff in the cross cause, said that the settlement was such as this court would not have approved for a ward, because it made no provision for a second marriage; and that the marriage, having taken place the day after the lady attained her age, the settlement was a fraud upon the jurisdiction of the court.

*Mr. Bell* for the trustees.

*Mr. Sugden* and *Mr. Treslove* for the infant:—The settlement recites an ante-nuptial agreement. Suppose there had been a previous agreement of which the settlement was, in fact, a violation; yet, as the lady was of age, it is to be considered that the control of the court was so far gone. If the husband had made exactly such a settlement as the court would have compelled him to make, the court would never treat it as binding on him and not on his wife. Besides it is very material to state that it appears, by the order for transferring the funds to the settlement account, that *Mrs. Long* was examined in court, and consented to the trusts of the settlement being carried into effect. She is therefore, bound by that consent, and is precluded now from objecting to the settlement.

The VICE-CHANCELLOR:—It is true that this is a settlement which the court would not have approved, for the reason stated; and the event which has happened here fully justifies the precaution of the court. In the case of *Mr.*

*Basely*, where the marriage was had during the infancy of the lady,  
[\*123] \*and in contempt of the court, the Lord Chancellor refused to give up any part of the lady's property after she came of age, until *Mr. Basely* had consented to execute such settlement as the master should approve. But here, the lady being of age, there was no contempt of the court in the marriage; and the jurisdiction of the court over her property had determined. The husband and wife were competent to dispose of her property in court; and the wife, having confirmed the settlement upon her personal examination, must be bound by it. Declare accordingly.

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It being afterwards discovered that *Mrs. Long* had consented merely to the 1,743*l.* 14*s.* 11*d.* stock being transferred to her husband, and had not con-

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firmed the settlement, and the Vice-Chancellor having been furnished by Mr. Belt with a note of a case of *Austen v. Halsey*,<sup>(a)</sup> his honor ordered the causes to be again \*put in the paper for judgment, and this day [\*124] delivered judgment as follows :

9th November.—The VICE-CHANCELLOR :—It is not the habit of the court, upon the marriage of a female ward, to settle the whole of her property in remainder, after an estate for life to her, upon the child or children of that marriage ; because it may happen that she may be left a very young widow, and ought, therefore, to have the means of making some provision, in that case, for a second family. The event which has happened in this case proves the wisdom of that rule of the court. Here the husband died in the year of the \*marriage, and before the birth of their only child. [\*125]

(c) This note, which we are enabled to publish by the kindness of Mr. Belt, was as follows :—

AUSTEN v. HALSEY.

11th March 1802. Reg. Lib. 1801. A. fol. 251.

The court retains its jurisdiction over the property of a ward of the court after the ward attains 21, so long as the property remains in court ; and, if the ward marries, will order a proper settlement to be made, or reform an improper one, unless the ward consents to the settlement either in court or under a commission.

Miss Austen having been a ward of the court, and having lately attained her age of twenty-one, a settlement previous to her marriage with Mr. Bedford, (dated July 6th, 1800,) was executed, whereby (amongst other things) a sum of 1,000*l.*, part of her fortune, was given to the intended husband, and 2,000*l.*, other part of her property, was settled to be laid out in 3 per cent. consols in the names of trustees, the dividends of which, after the marriage, were to be paid to Mr. Bedford for life, with remainder to Mrs. B. for life ; and, after the decease of the survivor, the trustees were to stand possessed of the said sum and interest in trust for the child or children of Mr. Bedford on the body of his said wife to be begotten, &c.

The marriage took place shortly afterwards. Upon the suit, which involved many important questions relative to real estate, &c. coming on for further directions before Lord Eldon, C. on the 27th November 1801, his lordship referred it to Mr. Wilmot to inquire, &c. whether the above was a proper settlement, and, in case the master should find it was not a proper settlement, Mr. Bedford was then to lay proposals before the master for a proper settlement on his said wife and the children of the marriage ; and, in either case, the said master was to state the same, with his opinion thereon to the court, and to make a separate report.

The master certified his opinion that the settlement was a proper one. Mr. and Mrs. Bedford presented their petition, praying a confirmation of this report and the consequential directions. The petition came on before Lord Eldon, C., when, upon Mr. Hall, of counsel for the petitioner, saying, amongst other things, that he considered such a reference could not have been intended.—

The Lord Chancellor observed that Mr. Hall was wrong ; that he fully intended it, and drew the order himself, since he could never do it in a fairer case ; and that he did so to prevent a common mistake. He wished it to be understood that though a female ward of the court when of age might make whatever settlement of her property she pleased, and might effectuate this by consenting personally in court, or under a commission for the purpose ; yet that, where this was not done, her property would never be discharged from the protection of the court except by the order of the court, and consequently, until such proceeding, she and her property must always be considered as having the protection of the court still around her. In the case before the court his lordship saw no objection. He did not anticipate any when he made the reference, and therefore it was a stronger case to settle the practice upon. Upon the matter before him his lordship confirmed the master's report, and made the order as prayed.



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 1824.—Cawthorn v. Chalie.
 

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The settlement in question, which gives the whole of this young lady's fortune after her death to this only child, is not, therefore, such a settlement as this court would have approved of; and the question is whether it can now be corrected. Here the young lady married, without any settlement, the very day after she came of age; and the subsequent settlement is, therefore, to be considered in this court as the act of the husband alone. If the young lady, after the settlement made, had confirmed it by her personal consent in court to the transfer of the property to the trustees of the settlement, she would have made it her own act, and would have been bound by it. But it appears that her consent in court was given only to the payment of a sum of 1,743*l.* 14*s.* 11*d.* stock to her husband; and the reference made [\*126] upon that occasion to the master proves \*that all consideration of the validity of the settlement was necessarily reserved. In the case of *Austen v. Hulse*, which has been referred to, Lord Eldon is stated to have held that even in the case of an ante-nuptial settlement, after a female ward has attained her age of twenty-one years, her property is not bound unless by her personal consent in court; and that, notwithstanding such ante-nuptial settlement, the court will not part with the property until a settlement is made to the approbation of the court. And in that case Lord Eldon sent it to the master to inquire whether the ante-nuptial settlement was a proper settlement. The principle of that decision goes much beyond the circumstances of the present case. Here there was so much precipitation in the fact of the marriage, which gave the husband the legal title to his wife's personal property, that his power of disposition might well be impeached upon the ground of surprise upon the lady, who had been of age only a single day.

Declare that the settlement is void, in so far as it limits to the wife an estate for life in the trust property in the event of her surviving the husband, and in so far as it limits the trust property after the death of the wife to the child or children of the marriage; and refer it to the master to consider and report what would have been a proper settlement of the trust property in the event of the wife surviving her husband, and there being an only child of the marriage; and reserve the consideration of further directions and costs.[1]

[\*127]

\*CAWTHORN V. CHALIE.

1824, 24th November.—*Administration.—Pleading.—Demurrer.*

Where a partner dies leaving the partnership accounts unsettled, the ecclesiastical court will grant administration of his effects to the surviving partners, or any persons claiming under them, if his next of kin decline it.

MATTHEW CHALIE, Edward Green, and John Chalie, deceased, had been in partnership as wine merchants; and, after John Chalie's death, the business

[1] Vide, *In the Matter of Anne Walker*, Lloyd & Gould, 299.

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was continued by the survivors. In November 1813 they dissolved partnership. The accounts of either of the partnerships had never been finally settled. In August 1821 Green assigned to the plaintiff his share of the profits of both the partnerships, as an indemnity for having joined as a surety for him in a bond. The bill prayed to have the accounts taken, and the affairs of the partnerships wound up. It alleged that there was not then any personal representative of John Chalie, but that the defendant Matthew Chalie was his only surviving next of kin, and was then entitled to take out administration to his estate, but that he refused so to do, or to permit the plaintiff to obtain the same; and that the plaintiff, by reason of such refusal, was unable to obtain letters of administration to John Chalie, or to make his personal representative a party to the suit.

The defendant, Matthew Chalie, demurred to the bill in the following terms:—"This defendant, by protestation, &c. and, for cause of demurrer, sheweth, that it appears, by the said complainant's own showing in the said bill, that a legal personal representative or representatives of John Chalie deceased, in the same bill named, is or are a necessary party or necessary parties to the accounts by the same bill sought to be taken, so far as the same relate to the partnership dealings in the same bill mentioned to have \*taken place in [\*128] the lifetime of the said John Chalie; and that no valid or sufficient reason is, by the same bill, alleged why letters of administration of the goods and chattels, rights and credits, of the said John Chalie left unadministered by his widow Susannah Chalie, in the said bill named, have not been taken out by the said plaintiffs, or by some person or persons who might be made a party or parties to the same bill; and yet the said plaintiffs have not, by their said bill, stated that any such letters of administration have been taken out, nor made any person or persons, in the character of such personal representative or representatives, a party or parties to the said bill: wherefore, &c."

Mr. Horne and Mr. Tinney, in support of the demurrer, insisted that the allegations of the bill did not form a sufficient reason for proceeding in the cause without a representative of John Chalie; and the Vice-Chancellor was of that opinion, upon the ground that the refusal of Matthew Chalie to permit the plaintiff to take out administration to John Chalie was altogether nugatory, as the plaintiff's title to such administration could not depend upon Matthew Chalie's permission, nor could be affected by his withholding it.

Mr. Agar and Mr. Ching appeared in support of the bill, and objected that this was in form a speaking demurrer.(a)

The Vice-Chancellor ordered the case to stand over, in order that the opinion of a civilian might be obtained whether the plaintiff, under the circumstances stated in the bill, was or was not entitled to procure \*an administration to the estate of John Chalie: and directed the case [\*129]

(a) See *Brownwood v. Edwards*, 2 Vez. 243; *Perry v. Owen*, 3 Atk. 740; and *Edsell v. Buchanan*, 4 Bro. C. C. 254, and 2 Vez. jun. 83.

1824.—*Hopcraft v. Hickman.*

to be spoken to upon the form of the demurrer, when such opinion should be taken; the defendant's counsel being taken by surprise as to that objection.

A case having accordingly been laid before Dr. Jenner, he gave his opinion thereon in the following words:—

“I am of opinion that William Cawthorn has not such an interest in the effects of John Charlie as will entitle him to be considered as a creditor, and, in that character, to cite the next of kin to accept or refuse administration of his effects. But I am of opinion that the ecclesiastical court will grant a limited administration to a person nominated by him for the purpose of substantiating proceedings in chancery, on the refusal of the next of kin after citation, and upon showing the necessity for such a representation.”[1]

When this case was again mentioned, upon the production of Dr. Jenner's opinion, the Vice-Chancellor allowed the demurrer, stating that the plaintiff must procure a limited administration to be granted to John Charlie's estate according to that opinion; and, as to the form of the demurrer, he observed that a speaking demurrer was where, by way of argument or inference, the demurrer suggested a material fact which was not to be found in the bill: that here there was much surplusage in the demurrer, but no suggestion of any new material fact.[2]

[\*130]

\*HOPCRAFT v. HICKMAN.

1824, 24th November.—*Vendor and purchaser.*

Two surveyors, who it had been agreed should fix the price of an estate, stated in their valuation the sum to be paid and the quantity of land, and that if it proved to be less either 84l. or 42l. per acre, should be deducted, according to the parts of the estate in which the deficiency occurred, but did not state the quantity contained in each part. Held that the valuation was uncertain, and that a specific performance could not be enforced.

Referees may take the opinion of a third person as evidence, but cannot previously agree to be bound by it.

THE bill stated that the plaintiff agreed to purchase an estate of the defendant at a price to be fixed by two surveyors, one to be chosen by each party: that a valuation was made accordingly, and was afterwards reduced into writing, and was as follows:

“In pursuance of an agreement, bearing date on or about the 13th May 1823, and made between Thomas Hopcraft of Crowton in the county of Northampton, gentleman, of the one part, and Thomas Hickman of Walcott, in the parish of Barnock in the county of Northampton, esquire, of the other part;

[1] Where parties in the first instance entitled to administration do not apply, it will be committed to the person having the greatest interest in the estate. *Alexander v. Stewart*, 8 Gill & Johnson, (Maryland,) 226.

[2] As to speaking demurrers, vide *McComb v. Armstrong*, 2 Molloy, 295; *Peed v. Cussen and others*, Sausee & Scully, 161; *Davies v. Williams*, 1 Sim. 8.

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we the undersigned having been respectively named by said Thomas Hickman and Thomas Hopcraft to make the valuation of the estate at Crowton in the county of Northampton therein mentioned, have this day viewed the same consisting of a mansion-house and offices and 73 A. 1 R. 8 P. of arable and pasture land, and have mutually agreed that the value thereof is 5,460*l.* 2*s.* including the timber and fixtures thereof and fruit and all other trees, and we accordingly, in pursuance of said agreement, declare the value thereof to be 5,460*l.* 2*s.*; and we also declare that, if there shall be any error in the admeasurement above mentioned, an allowance at the rate of 42*l.* for every acre, either less or more than the said admeasurement, shall be made out of or in addition to the said purchase money, as the case may happen, if the mistake be in the allotment in the Horse Moor field over the brook; and an allowance of the same nature at the rate of 84*l.* for every acre, if \*the mistake be [\*131] in the other part of the estate on the house-side of the brook. Dated the 12th January 1823, Abraham Paddy Phillips, Barnet John Hopcraft."

That a few days after the valuation was made, the defendant wrote a letter to the plaintiff in the words following:—"Sir, I do hereby give you notice that I consider the mode pursued by Mr. Abraham Paddy Phillips and Barnet John Hopcraft, in valuing the mansion-house, lands and premises at Crowton between you and myself, irregular and not according to the agreement entered into by us, inasmuch as they did appoint two builders or surveyors to value the mansion-house and buildings, part of such estate, without my consent and approbation, and I do therefore object to the interference of such persons, and refuse to abide by the present valuation."

That Barnet John Hopcraft and Abraham Paddy Phillips, being both of them land-surveyors only and not accustomed to survey and value houses and buildings, did of themselves determine or agree to obtain the assistance of William Litchfield and George Starkie in valuing the said mansion-house and buildings, and that Litchfield and Starkie were builders and surveyors and valuers of houses and buildings by trade or profession, and were and are well known to be skilful in such matters, and that the determination or agreement of Barnet John Hopcraft and Abraham Paddy Phillips was formed upon the proposal and suggestion of Abraham Paddy Phillips, the valuer appointed by the defendant as aforesaid; and that, in pursuance of such determination and agreement, the said Barnet John Hopcraft and Abraham Paddy Phillips employed Litchfield and \*Starkie to survey and compute the value [\*132] of the mansion-house and buildings, but not of any other part of the estate and premises, and that Litchfield and Starkie did accordingly survey and examine the said mansion-house and buildings, and did communicate their opinion and judgment as to the value thereof to Barnet John Hopcraft and Abraham Paddy Phillips, and that Barnet John Hopcraft and Abraham Paddy Phillips having considered such opinion and judgment, adopted the same as their own, and founded their valuation of the said mansion-house

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and buildings thereon: that, at the time when the said valuation was agreed upon, Barnet John Hopcraft and Abraham Paddy Phillips were attended by Mr. Robert Weston as the solicitor, or agent of the solicitor for the defendant, and by Mr. Alfred Hayward the solicitor for the plaintiff; and that the employment of William Litchfield and George Starkie as aforesaid was communicated to, and was perfectly well known by Messrs. Hayward and Weston, and was not in any manner objected to by them or either of them; and that the written declaration or valuation was drawn up and signed under and with the sanction and acquiescence of the said Mr. Weston on behalf of the defendant, after he well knew that Barnet John Hopcraft and Abraham Paddy Phillips had availed themselves of the knowledge and assistance of Litchfield and Starkie. And the bill prayed that it might be declared by the decree of the court that, under the agreement and the valuation of the premises so made by Barnet John Hopcraft and Abraham Paddy Phillips, the defendant was the purchaser of the premises at the price of 5,460*l.* 2*s.*; and that he might be compelled to complete such purchase.

To this bill the defendant put in a general demurrer.

[\*133] \*Mr. *Horne* and Mr. *West* in support of the demurrer:—If the price of this estate had been properly fixed by the valuers, it would have been the same as if it had been fixed by the parties themselves. But the price was not properly fixed by the valuers. The valuation by which the parties were to be bound was to be made by surveyors appointed by each party; and, if they could not fix a value, whether from ignorance or any other cause, their only course was to choose an umpire. The valuers acknowledged by their conduct that they were unable to fix a value; but, nevertheless, they never appointed an umpire. They did not choose to exercise the power which had been delegated to them; but they called in two other persons to exercise it. Such conduct is a direct violation of the maxim "*delegatus non potest delegare.*" There is a great difference between a valuation made by a builder, and one made by a land surveyor. The latter would consider the house with reference to the land only. The former would estimate it according to the value of the materials. It is impossible to hold that the parties are bound by this valuation.

There is another objection to this valuation: that it is not final. It was clearly intended by the parties that the valuation should be made in such a manner as to prevent any further dispute between them. But the price is not finally fixed by this estimate. It may be either to be increased or diminished, according as the number of acres shall turn out to be more or less than the estimated quantity. It is nowhere asserted that the estate has been accurately measured, and that it contains the quantity of land mentioned in the valuation. Consistently with this award the sum stated as \*the price might have been diminished one-half. It is quite clear that, before a specific performance can be decreed, the price must be fixed either by the

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parties, or by those to whom they delegate that duty. Can the court, in this case, say what the price to be paid for this estate is? If it cannot, a specific performance cannot be decreed.(a)

Mr. *Bickersteth*. in support of the bill :—The objection that this award is uncertain cannot be made upon demurrer. It must be done either by plea or answer. Without an allegation of error there cannot be any relief against this award.

The VICE-CHANCELLOR :—If the two arbitrators had agreed together to be bound by the opinion of the two builders whom they consulted, there would have been much weight in the first objection to the award. But, according to the statement of the bill, upon which I am now to act, the arbitrators received the opinion of the two builders merely as evidence, and adopted it as their own upon the credit which they gave to the testimony. As to the second objection; *id certum est quod certum reddi potest* and, if the addition or deduction upon remeasurement had been to be made at a certain rate per acre as to all the land, there would have been no difficulty. But the arbitrators have directed that the addition or deduction should be made at the rate of 84*l.* an acre, as to land on the house-side of the brook; and at the rate of 42*l.* an acre, as to land on the other side of the brook; and have not told us how much of the 73 A. 1 R. 8 P. (which they estimate to be the whole quantity of land) they have considered to be lying on the house-side of the \*brook; and, consequently, there are no means of determining to [\*135] what extent the 84*l.* is to be allowed, or to what extent the 42*l.* only is to be allowed. It is for this reason that I consider the award not to be final and certain, and allow the demurrer.

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#### CARRINGTON v. JONES.

1824, 26th November.—*Tithes*.—*Evidence*.—*New trial*.

The custody from which a document offered in evidence is taken can not be proved by an interested person.

The plaintiff represented himself in his bill as entitled to the tithes of the parish of B. without noticing a district called H. which was part of the parish, but had of late years been considered as a distinct parish. At the trial of issues as to certain moduses in B., the plaintiff proved that H. was part of B. and that the moduses did not prevail in H. The verdict however was in favor of the moduses. A motion by the plaintiff for a new trial was refused, because the evidence as to H. was a surprise upon the defendants, and was calculated to defeat the intention of the court in directing the issues.

THE bill stated that the plaintiff was, sometime in the year 1799, lawfully presented, instituted and inducted to the vicarage of the parish and parish church of Berkley, and had ever since been the true and lawful vicar thereof; and, as such vicar, was lawfully entitled to have, receive and take all and singular the

(a) See *Emery v. Wase*, 5 Ves. 846; and 8 Ves. 505.

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tithes yearly arising, growing, renewing or increasing within the said parish, and the titheable places thereof, (except the tithes of corn, grain and hay) : and it prayed for an account and payment of the tithes to which the plaintiff was so entitled.

At the hearing of the cause the Vice-Chancellor directed the following issues to be tried.

1st. "Whether from time whereof, &c. there hath been payable and [\*136] paid, and of right ought to be paid, to \*the vicar of the parish of Berkley in the county of Gloucester, by the owners and occupiers of lands in the said parish, for every milch cow kept within the said parish at any time within the year, the sum of one penny at Lammas in each year, for and in satisfaction of the tithe of the milk of such cow."

And "whether from time whereof, &c. there hath been payable and paid, and of right ought to be paid, to the vicar of the parish of Berkley in the county of Gloucester, by the owners and occupiers of lands in the said parish, for every colt foaled within the said parish at any time within the year, the sum of one penny at Lammas in each year, for and in satisfaction of the tithe of such colt."

The verdicts were in favor of both moduses.

The plaintiff now moved for a new trial. The grounds upon which the motion was made will appear from the arguments.

Mr. Sugden, Mr. Curwood, and Mr. Oldnall Russell in support of the motion:—1. The first ground upon which we are entitled to ask for a new trial, is that certain receipts for these moduses, signed by two persons now deceased, named James and Richard Croome, were admitted in evidence without proving the characters of the persons who signed them. It was not shown whether they received the tithes as lessees, or as collectors for the vicar. Mrs. Viner, who was the daughter of Richard and sister of James, when examined as to this point, stated merely that her father and brother held under four of the former vicars; and that her brother took the tithes, and her [\*137] \*father before him. These receipts could not prejudice the plaintiff's claims, unless the parties giving them were collectors for the vicar; and, in that case, the defendants totally failed in proving that they filled that character. It has been decided, in *Short v. Lee*,<sup>(a)</sup> that a book in the handwriting of a person purporting to contain accounts of tithes collected by him seventy years ago, cannot be received in evidence without proof that that person was collector of tithes at that time; and the case of *Manby v. Curtis*<sup>(b)</sup> is to the same effect. Nor were these persons proved to be lessees. If they were so, they must have held under a lease; for a deed is always necessary to pass an interest in tithes, except where the occupier retains them by agreement with the incumbent. Now no lease was produced, nor was any evidence given of its loss so as to make the parol evidence of Mrs. Viner, that her father

(a) 2 J. & W. 464. See particularly page 465.

(b) 1 Price, 225.

1824.—*Carrington v. Jones.*

and brother held the tithes, admissible; nor is there any thing to satisfy the court that the lease may not now be in existence, and in the possession of the executors of the lessees. But, supposing it to have been satisfactorily proved that the Croomes were lessees, the plaintiff's rights cannot be affected by these receipts; because a lessor cannot be prejudiced by the acts of his tenant.(c)

2. The moduses were laid as covering the whole parish of Berkley. We proved, from the nona rolls, the parliamentary survey and the minister's accounts of the 22d Henry 8, that a vill called Hill formed part of the parish of Berkley, though it has now acquired the reputation of being a distinct parish. And it appeared from the terrier belonging to this parish that the inhabitants of Hill were bound to keep in repair the mounds \*of the [\*138] churchyard of Berkley. Now, as we also proved that Hill pays tithes in kind at this day, it is impossible that these moduses can be supported, as they are alleged to extend over the whole parish. The evidence, therefore, given by us to prove that Hill was part of the parish of Berkley, was very material. But the learned judge withdrew from the consideration of the jury the question whether Hill was or was not part of the parish of Berkley, and directed them that Hill was a distinct parish. We do not pretend to say how Hill became separated from Berkley. Our objection is that the fact of its being so was left to the jury as if we had given no evidence upon that subject.

3. Certain receipts for these moduses and other documents were handed in on behalf of the defendants, and the learned judge allowed persons who were occupiers of land in the parish, and were, therefore, interested, to prove out of what custody they had been obtained. Any person may hand in documents, but if it is necessary, in order to give authenticity to them, to prove the custody from which they came, an interested witness cannot be allowed to give evidence on that subject. *Lord Clanrickard v. Denton.*(d)

Mr. Taunton, Mr. Heald, Mr. Twiss and Mr. Koe, for the defendants, were desired by the Vice-Chancellor to confine themselves to the question whether Hill was part of the parish of Berkley.

The persons who composed the parliamentary survey were not infallible. Their duty was to ascertain the value of property which had belonged to the religious \*houses; and not the divisions of counties, hamlets [\*139] and parishes; and they, consequently, had no authority to decide upon any other question than that of value. The words "In the parish of Berkley" which follow the naming of this district in the survey, are merely incidental. The attention of the commissioners who made the survey was called to the rental and the occupation of the lands; and it is too much to take it for granted that, because these words were used which were not material to the object of the commissioners, Hill was always in the parish of Berkley. Except this instrument and the other documents which were produced for the

(c) See *Wood v. Veal*, 5 B. & A. 454.

(d) 1 Gwill. 360.



1824.—Carrington v. Jones.

same purpose, all the evidence negatives that Hill was part of the parish. Mr. Lodge, the present incumbent of the living of Hill, stated, at the trial, that it was not a member of the parish of Berkley, but was a distinct cure. With respect to the statement in the terrier that the parishioners of Hill were bound to repair the mounds of the churchyard of Berkley, that is evidence that Hill was then a distinct parish from Berkley. The parishioners who signed the terrier could not have any interest in misdescribing the parish. It is impossible to account for that burden being imposed upon Hill. But there might have been some connection between the two parishes which is now forgotten. The founder of the church of Berkley might have had property in Hill, and might have entailed that burden upon his property there. In order to support a prescription for a seat in an aisle of a church, it is an intendment perpetually made that the aisle was built by the founder of the family which claims the seat. But, supposing that Hill is a member of the parish of Berkley, the object of the court in directing these issues has been answered by these verdicts; for your honor's intention was to find whether these mod-  
 [\*140] uses existed in that part of the parish \*of which the plaintiff is entitled to the tithes. Besides the defendant is precluded, by the statement in the commencement of his bill, from taking this objection; and the issue is quite consistent with that statement. The plaintiff was aware, from the statement in the terrier, that there was a connection between Hill and Berkley; and, if he meant to take this objection, he ought to have amended his bill and stated so, and words ought to have been introduced into the issue with a view to ascertain whether the moduses did not prevail in Hill as well as in Berkley. The taking of the objection in the present stage of the cause is a surprise upon the court, and the plaintiff ought not to be allowed to avail himself of it.

Mr. Curwood in reply:—If the court declares that the moduses prevail throughout the whole parish of Berkley, it will bind the incumbent of Hill. For there is no question that Hill is part of the parish of Berkley. The parliamentary survey was taken, not by commissioners, but by a large jury of the county. It is impossible that the same mistake should be made in three public documents. The parishioners of one parish cannot prescribe that the parishioners of another parish should repair the walls of their church. There may be a prescription in the same parish, but not in different parishes.

The Vice-Chancellor, considering the other grounds upon which the new trial was moved for as not maintainable, stated that he entertained doubt whether an interested witness could be permitted to prove out of what custody a produced document came, where such proof was essential to its reception as evidence; [1] but that it was not necessary to consider the point further; because, if the receipts in question had been rejected, he should not have

[1] Yet a party in a cause is allowed to prove the loss or destruction of a written document, in order to lay a foundation for the introduction of secondary evidence. *Blade v. Noland*, 12 Wend. 172; *Schermehorn v. Schermehorn*, 1 Wend. 119.

1824.—Tyson v. Fairclough.

\*been satisfied, upon the remaining evidence, with any other verdict [\*141] than that which had been found. And, as to the objection with respect to Hill, he observed that the issues were framed according to the manner in which the plaintiff had stated his own case upon his bill, where he had represented himself as entitled to the small tithes throughout the whole parish of Berkley, and that no notice was taken of Hill in any of the pleadings in equity; that the introduction of the evidence as to Hill was, therefore, not only a surprise upon the defendants, but was calculated to defeat the intention of the court in directing the issues, by enabling the plaintiff to snatch a verdict upon a point not touching the merits of the case in equity between the parties; and that, if the jury had found a verdict for the plaintiff upon the ground of Hill being a member of the parish of Berkley, he would not have acted upon such a verdict; that, for these reasons, although he did consider that there was strong evidence that Hill was but a member of the parish of Berkley, he must refuse the motion for a new trial, and must refuse it with costs.

The order made was in the following words: "This court doth refuse the motion, although upon, the evidence given by the plaintiff at the trial of the issue, the jury might have been warranted in finding a different verdict, upon the ground that the alleged parish of Hill was in truth but a township of Berkley, and that the moduses in question did not extend to such township, and consequently did not prevail throughout the whole parish of Berkley, as by the form of the issues was affirmed by the defendants; because such evidence so given by the plaintiff was altogether a surprise upon the defendants, and was inconsistent with the case made by the plaintiff \*in the plead- [\*142] ings in equity, and did not in any manner affect the merits of the case in equity between the plaintiff and defendants, and was calculated to defeat the trial of such merits, and to disappoint the intention of the court in directing the issues."

TYSON v. FAIRCLOUGH.

1824, 29th November.—*Receiver.—Tenant in common.*

Motion for a receiver by one tenant in common against his co-tenant, on the ground that the latter had given notice to the tenants to pay their rents to him only, and had advertised the estate for sale, refused, because the conduct complained of did not amount to an exclusion.

THE plaintiffs and the defendant were tenants in common of some freehold and leasehold houses under a will of which the defendant was executor.

In 1814 the defendant had entered into a written agreement with the plaintiffs to permit the latter to receive the whole of the rents, until they had repaid themselves two sums due to them from the defendant. The plaintiffs had been in receipt of the rents ever since the agreement was made; but, in May last,

1124.—Tyron v. Fairclough.

the defendant gave notice to the tenants to pay the rents to him and not to the plaintiffs, and that he would enforce such payment by distress if necessary.

In July the defendant advertised the houses for sale; upon which the bill was filed for a receiver and an injunction to restrain the sale; but, before the injunction was served, the defendant had actually sold all the houses but one. The bill insisted that a balance of 51*l.* was still due to the plaintiffs. The answer stated that, by the accounts rendered, such a balance appeared to be due, but that, upon investigation of the accounts, it was found that 25*l.* only was due, allowing the accounts to be just, which the defendant did not admit; and that \*the defendant had tendered the 25*l.* to the plaintiffs, but they refused to accept it: that the plaintiffs had been repaid all that was due to them, or that they might have been repaid it if they had thought proper.

Mr. Agar and Mr. Koe, for the plaintiffs, now moved for a receiver, and founded their application, 1st, upon the agreement; 2d, upon the notice given by the defendant to the tenants, and his having sold the property, which they contended amounted to an actual exclusion of the plaintiffs; and they cited *Evelyn v. Evelyn*, (a) *Street v. Anderton*, (b) *Milbank v. Revell*. (c)

The VICE-CHANCELLOR:—If the defendant were now availing himself of his legal title to receive rents and profits which, under the agreement, were, in effect, assigned to the plaintiffs, there would be ground for the appointment of a receiver; but according to the answer he has fully paid the sum mentioned in the agreement, except a small balance, which has been tendered to the plaintiffs and refused. It is said, however, that the notice given by the defendant to the tenants no longer to pay the rents to the plaintiffs but to him, the defendant, amounts to an exclusion of the plaintiffs from their own share of the profits of the undivided estate, and that where there is such exclusion a court of equity will, according to the cases cited, appoint a receiver. Exclusion is where one tenant in common receives the whole rent, and excludes his companion from the share due to him. The notice of the defendant is not [\*144] exclusion: notwithstanding this notice, the tenants may pay \*the whole of the rents to the plaintiffs, and certainly may safely pay to the plaintiffs their due share of the rents. I do not even consider, upon the circumstances of this case and the answer of the defendant, that this notice is evidence of an intention on the part of the defendant to withhold from the plaintiffs the share of the rents which belongs to them. The defendant does not dispute the title of the plaintiffs; the agreement is founded on the admitted title of the plaintiffs; and the plain purpose of the notice is to prevent the plaintiffs from receiving the rents, because they insist upon retaining the defendant's share in satisfaction of a balance which, according to the answer of the defendant, is not due from him. I may observe that, even in the case of any actual exclusion of one tenant in common by another, I doubt whether this court would appoint a re-

(a) 2 Dick 800.

(b) 4 Bro. C. C. 414.

(c) 2 Mer. 405.

1834.—Gillespie v. Alexander.

ceiver. If it were an exclusion which amounted to an ouster at law the party complaining must assert at law his legal title. If it were not such an exclusion, this court would compel the tenant in common in receipt of the rents to account to his companion; but would not, I think, act against his legal title to possession; and the reason is, because the party complaining may at law relieve himself by the writ of partition. It is upon this ground that this court has constantly refused to restrain a tenant in common from cutting timber, or doing any other act not amounting to destruction. Where the estate in common is equitable, the court does interfere; because it acts against the legal estate of the trustee only, who is guilty of a breach of trust if he permits one equitable tenant in common in any manner to prejudice the interest of the other. Of the cases cited, *Street v. Anderton* was an equitable estate; *Evelyn v. Evelyn* is but a word, and does not explain the nature of the estate; and *Milbank v. Revett*, which was very shortly and very loosely argued, [\*145] considers that the principles which are applied to partners are applicable also to tenants in common, which probably would not have been the opinion if the case had been more fully argued.

## GILLESPIE v. ALEXANDER.

1834, 6th & 7th December.—*Legacy.*

Legacies given to the same persons, though by different instruments, and, in some instances, of different amounts, held to be substitutional.

GENERAL GILLESPIE made four testamentary papers, all in his own hand writing. The first was as follows:—"Being perfectly in my senses, I declare this to be my last will and testament; and I accordingly leave the little I possess in the following manner:—I bequeath to my daughter, Selina Gillespie, the dear pledge of an attachment to a most amiable woman who is no more, a sum of money equal to 12,000*l.* sterling, to be paid on the day of her marriage, provided she has the approbation of the majority of her guardians; but in case she should marry imprudently, and without their consent, only the sum of 5,000*l.* To Mrs. Annabella Gillespie, I bequeath the sum of 250*l.* a year annuity for her natural life, which will be paid out of the interest arising from the said 12,000*l.* bequeathed to the aforesaid Selina Gillespie, I bequeath 1,000*l.* to George Gillespie, a natural son of mine, now residing in Jamaica. I bequeath 1,500*l.* to Robert Gillespie, a natural son by Eugenie Pechier, a French lady of St. Domingo, who is to be heard of at Kingston, Jamaica. The boy was at school sometime ago at Mount Airy academy, Philadelphia, America. I bequeath 500*l.* to my son by Mrs. Charlotte Wallen; Major Thorn can give an account of her. I bequeath to my housekeeper, now living with \*me, 1,000*l.*: that will be paid to her from the sale [\*146]

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of my furniture, &c.; all the ready money I have in the house, and my linen and clothes. Captain Byers will be good enough to invest this money for her in the hands of Mr. Alexander, who will send her to Europe, and, when she arrives at home, she will receive 250*l.* in cash; the rest Mr. Alexander will purchase and lay out in annuity for her natural life. As I am not clear how my property may turn out, I cannot distinctly say how it is to be divided; but, to prevent disputes, it will be as follows: I will suppose my Java and Palambang prize money will be equal to 5,000*l.*; indeed it ought to be near twice that sum; the sale of my stock in trade in Meerut, houses, wines, plate, &c. &c. stands me in about 7,000*l.* sterling; jewels to the amount of 1,200*l.* sterling, as also, in the care of Captain Fortune at Lucknow, 500*l.* sterling; a necklace at Mr. Alexander's worth 250*l.* sterling, should it turn out to be equal to what I calculate upon, exclusive of 12,000*l.* lent to Mr. Alexander for five years and the other property of mine in his hands that will cover my above-mentioned behests. I bequeath a sufficient sum to my daughter Selina Gillespie as to yield her a clear 600*l.* sterling per annum; the remainder, except 500*l.* I bequeath to Eugenie Pechier, I leave to Captain R. Houghton of Belfast, Ireland, and to his issue by Jane Gillespie; and in case my daughter Selina Gillespie should die, I leave the whole of the sums above mentioned for her use to the said R. Houghton and his heirs by Jane Gillespie. I am so ill that I cannot proceed further. Meerut, July 6th, 1814."

The second was without date, and was in the following words:—  
 [\*147] "I constitute and appoint to be my executors Sir \*William Kier, major general; Captain Byers, royal artillery, and Mr. Joseph Alexander; as also to be guardians to my dear Selina Gillespie."

The third was as follows;—"Dhoon, October 30th, 1814. I leave and bequeath to Mrs. Gillespie, my wife, the sum of 300*l.* per annum, for her personal life; and to my natural daughter Selina Gillespie, now in under the care of Colonel Caldwell at Madras, the sum of 8,000*l.* to be paid to her on the day of her marriage, previous to that the interest to be appropriated to her education and board. I request Colonel Caldwell, Sir William Keir and Mr. Joseph Alexander to act as her guardians and trustees. I have left a memorandum leaving to Mrs. Mary Ann Vineall 1,000*l.*, and clothes, furniture and many things in my godowns at Meerut; I confirm all items mentioned in that memorandum. I leave to Robert Gillespie, my son by Mademoiselle Eugenie Pechier, of Port-au-Prince, St. Domingo, and who is now at school at Mount Airy or Mount Pleasant academy, near Philadelphia, 1,500*l.* sterling; and to his mother 1,000*l.* sterling; also to my natural son by Charlotte Wallen, 500*l.*; should any prize-money hereafter, for Java, turn out advantageously, these sums and bequests will be increased in proportion to the extent of my present property. Should Selina Gillespie die before marriage my bequest to her will be paid to the eldest son of Richard Houghton and Jane Gillespie, my cousin.

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1824.—Gillespie v. Alexander.

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The two children by the Malay girls, to each I leave two thousand rupees; Four and Leary, five hundred each."

The fourth was as follows:—"Saharampore, October 23d, 1814. If any accident \*should happen to me I leave and bequeath Mary Ann [\*148] Vineall 1,000*l.* sterling, which Mr. Alexander will be good enough to lay out in the purchase of an annuity for and during the life of the said Mary Ann Vineall. I also leave and bequeath to her all my furniture, clothes, linen and stores in the godowns, and which will be turned or not into cash, as the said Mary Ann Vineall may be disposed to determine; also a sufficient sum of money to pay her passage to Calcutta, and eventually to Europe. I calculate the stores, furniture, &c. at 18,000 rupees."

On the 31st October 1814, the day after the date of the third paper, the testator was killed in battle. All the legatees, except George Gillespie, survived him.

The decree directed the master to inquire of what the testator's personal estate consisted at the dates of the first and third papers, and at his decease. The master reported that he was unable to ascertain what the testator's personal estate consisted of at the periods before mentioned; that no evidence had been laid before him to satisfy him that any accession was made to the testator's personal estate between the dates of those papers, or his death; that he was of opinion that no accession was made to such property between those periods respectively; and that the only valid legacies given by the testamentary papers were those contained in the third paper and the memorandum referred to thereby.

To this report the defendant Selina Gillespie took the following exception:—"Because the master ought to have certified that the several legacies and provisions given to or mentioned \*to be intended for the [\*149] defendant Selina Gillespie, by the first and third of the testamentary papers, were, and ought to be considered as separate and distinct legacies to or provisions for her, and that she was therefore entitled, under the first of the said testamentary papers, to a contingent legacy of 12,000*l.* payable in the event and on the condition therein mentioned, or otherwise; and, in the event of the same not taking effect as therein mentioned, then to the legacy of 5,000*l.* only, payable as explained therein, subject however, as to the said sum of 12,000*l.*, in the event of the same becoming payable, to the payment out of the interest thereof of an annuity of 250*l.* during the life of the plaintiff, dame Annabella Gillespie; and that Selina Gillespie was also entitled, under the first testamentary paper, to such a sum of money as should be sufficient, at the time of payment thereof, to produce a clear yearly sum of 600*l.* per annum by way of interest thereupon; and that, in addition thereto, the said defendant Selina Gillespie was also entitled, under the third testamentary paper, to the sum of 8,000*l.* so as aforesaid reported due to her, with interest for the same as therein mentioned; and subject also to such contingent increase thereof in

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proportion to the amount of the Java prize-money, as by the third testamentary paper mentioned as to all the bequests thereby given."

Mr. *Hart* and *Merivale* in support of the exception: We admit that the legacies of 12,000*l.*, and 600*l.* a year, can not be cumulative.

The rule is quite clear, that legacies of different amounts, whether [\*150] given by the same instrument or by \*different ones, are cumulative, unless some reason appears on the face of the instrument for their being substitutional. There is no case in which such legacies have been considered substitutional, unless there have been circumstances in the instruments from which an intention that they should be so considered might be collected: such circumstances are not to be found in this case.

The legacies given to *Selina Gillespie*, by the first and third papers, differ from each other in the following particulars: The legacy given to her by the latter is less than that given to her by the former; and, according to every rule of construction, a smaller legacy cannot be a satisfaction of the greater one. One is given conditionally, and the other, absolutely. There is nothing in the fourth instrument that refers to the legacy given by the first.

As this is a latent ambiguity, the amount of the testator's property at the time he made these instruments, may be taken into account in construing them.[1] It is clear, from that clause in the will which begins, "As I am not clear how my property may turn out," that the testator intended to dispose of the whole of his property, and considered that the legacies he had given would exhaust the whole of it. Now he estimates his property to be worth 28,784*l.* at the least; the legacies given by the two papers amount to 31,095*l.* if those which are of the same amount in both instruments, are not taken into account; so that there would be a deficiency of 2,311*l.* only. That deficiency is too small to induce the court to hold that these legacies are not cumulative, especially as the testator contemplated an increase of property from his prize-money.

[\*151] \*The cases cited were *Hurst v. Beach*, (a) *Attorney General v. Harley*, (b) and *Attorney General v. Grote*. (c)

Mr. *Sugden*, Mr. *Treslove*, Mr. *Skirrow*, Mr. *Romilly*, and Mr. *Stephenson* appeared for the other parties.

The VICE-CHANCELLOR: There is so much inaccuracy in the expressions of the two instruments of the 6th of July, 1814, and the 30th October, 1814, that no court can with confidence say it can arrive at the true intention of this testator. I am, however, clearly of opinion that the paper of the 30th October, 1814, is, as far as regards the pecuniary legatees therein named, but not fur-

(a) 5 Madd. 351.

(b) 4 Madd. 263.

(c) 3 Mer. 316.

[1] "I consider the rule as settled: you are at liberty to prove the circumstances of the testator, so far as to enable the court to place itself in the situation of the testator at the time of making his will, but you are not at liberty to prove either his motives or intentions." Lord Langdale in *Martin v. Drinkwater*, 2 Beav. 218. *Eden v. Williams's ex'r*, 3 Murphy, (North Carolina,) 27.

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ther, a substitution for the first paper of the 6th of July, 1814, and that such legatees can only claim under the paper of the 30th October, 1814; and I must, therefore, overrule the exception taken on the part of the infant daughter. Every legatee named in the first paper is again named in the other, except George Gillespie, who appears by the master's report to have been then dead; and in several instances the amount of the legacies is the same as in the first paper.

The two great difficulties in the cause are as to the meaning of the testator with respect to the increase of his legacies in case the Java prize-money should turn out advantageously, and as to what is to become of his residuary estate. When he says that the legacies are to be increased if the prize-money turn out advantageously, he must have had in his mind some estimate of the amount of the prize-money; and referring \*to the first testamentary pa- [\*152] per, where the prize-money is estimated at 5,000*l.* with a strong expression of hope that it may exceed that sum, I must infer that he had that idea in his mind at the writing of the paper of the 30th of October; and the true meaning of the expression in question is, that if the Java prize-money shall exceed 5,000*l.* then the several legacies before given by that paper shall be increased proportionably, with respect to his residuary estate. I take it that, in the estimate which he makes of his property in his first testamentary paper, he means to express that the several items of property enumerated, exclusive of the 12,000*l.* lent to Mr. Alexander, but inclusive of the testator's other property in Mr. Alexander's hands, will cover the several legacies which he had thereinbefore given. Those legacies as I compute them, amount to 16,000*l.* and the enumerated property to 13,950*l.* according to the testator's estimate. The property in Mr. Alexander's hands, exclusive of the 12,000*l.* appears to have turned out to be 2,834*l.*, and this sum with the 13,950*l.* would, as the testator expresses it, cover his bequests thereinbefore mentioned. In such case he increases the provision for his daughter to 600*l.* per annum. He then gives 500*l.* to Eugenie Pechier, and his residuary estate to Captain Houghton of Belfast, and his issue by Jane Gillespie; and in case of the death of his daughter the provisions for her are to fall into the residue. In the paper of the 30th October 1814, he gives the provision intended for his daughter, if she dies before marriage, to the eldest son of Captain Houghton and Jane Gillespie, but says nothing whatever with respect to his residuary estate in any part of this paper. Considering therefore the paper of the 30th of October 1814, not as a total revo- [\*153] cation of the first testamentary \*paper, but as a substitution with re- spect to the legacies only, it will follow that the disposition of the residuary estate made by the first paper remains unaltered, and that the residuary estate belongs to Captain Houghton and his issue by Jane Gillespie; and, as that family have agreed between themselves with respect to this property, it becomes unnecessary to make any declaration as to the construction of this gift.

Refer it to the master to inquire to what extent the estate of the testator



1824.—*Cooke v. Soltau.*

has been or will be benefited by the Java and Palarnbang prize-money ; and declare that if such prize-money should exceed the sum of 5,000*l.* then that the several legacies given by the said testamentary paper of the 30th of October 1814, other than the legacies to the two Malay girls and to Four and Leary, are to be increased proportionably to such excess ; and let the master proportion such excess between the said several legatees ; and declare that the residuary estate of the said testator, after payment of his debts and legacies, belongs to the said defendant Richard Houghton and his issue by Jane Gillespie.[1]

[\*154]

\*COOKE v. SOLTAU.[2]

1824, 15th December.—*Title.—Presumption.*

A reconveyance of a mortgage made in 1745, but not afterwards mentioned in the title deeds, ought to be presumed, where no demand of either principal or interest has been made for several years, and the mortgage deeds have been long in the possession of the owner and his ancestors.

THE defendant had agreed to purchase of the plaintiff some houses in the city of London, but refused to complete his purchase because it did not appear by the abstract that an old mortgage had been paid off, or that the legal estate had been reconveyed. This suit was accordingly instituted to compel a specific performance of the agreement ; and the question was, whether, under the circumstances of the case, the payment and reconveyance ought to be presumed.

The facts of the case were as follows :—The plaintiff's grandfather, being seised in fee of the houses in question, subject to a mortgage in fee made in 1733, by his will, dated the 7th of December 1734, devised all his messuages, lands, tenements and hereditaments to dame Elizabeth Child and Richard Lockwood, and their heirs, upon trust to pay one moiety of the rents and profits to his wife Abigail Cooke for her life, and the other moiety to the use and benefit of his son John Cooke, the plaintiff's late father, until he should attain the age of twenty-one years, or die ; and, after he should attain that age, upon trust to pay one moiety of the rents and profits unto his son, for his own use, during the joint lives of the testator's son and wife ; but, if his son should die before his wife, in trust for his wife to receive the whole rents and profits of the premises for her life, and, after her decease, in trust to pay all the rents

[\*155] and profits to his son, and \*permit him, his heirs, executors, administrators and assigns to hold and enjoy the premises. The will contained

[1] S. C. 3 Russ. 130, but on a different point. See further *Wray v. Field*, 2 Russ. 257 ; *Mackenzie v. Mackenzie*, *ibid.* 362 ; *Guy v. Sharp*, 1 Myln. & Keen, 589 ; *Watson v. Reed*, 5 Sim. 431. *Gordon v. Hoffman*, 7 Sim. 29 ; *Attorney General v. George*, 8 Sim. 138 ; *Robley v. Robley*, 2 Beav. 95 ; *Martin v. Drinkwater*, 2 Beav. 215 ; *Hemming v. Gurrey*, *post*, 321.

[2] "This case was decided in December 1823, and not in December, 1824, as stated in the report." *Goodson v. Ellison*, 3 Russ. 583, note.

1824.—Cooke v. Soltan.

a direction that the executors should retain out of the premises all such charges and expenses as they should be put unto by reason of the trusts reposed in them, but did not contain any other charge upon the testator's real estates, or any power for the trustees and executors to raise money by mortgage. The testator appointed dame Elizabeth Child and Richard Lockwood executrix and executor of his will.

In 1736 the mortgagees, upon payment of their mortgage-money, conveyed the premises to Elizabeth Child and Richard Lockwood, their heirs and assigns.

Richard Lockwood survived Elizabeth Child: and, by indentures of lease and release of the 24th and 25th of May 1745, made between him and Abigail Cooke of the one part, and Robert Johnson of the other part, after reciting the will, and that Lockwood, to enable him to perform several of the trusts of it, had occasion to borrow 300*l.* upon the security of the premises, which Robert Johnson, at the request of Abigail Cooke, had agreed to advance; in consideration of the 300*l.*, Lockwood and Abigail Cooke conveyed the premises to Robert Johnson, his heirs and assigns, subject to redemption on payment by Lockwood and Abigail Cooke, or either of them, or the heirs, executors or administrators of the testator, to Robert Johnson, his executors, administrators or assigns, of the 300*l.* and interest, on the 26th of May 1746.

No further mention was made in the abstract of this mortgage, or of any reconveyance or conveyance of the \*premises by the mortgagee, his heirs or assigns. By an indenture dated the 24th of March 1791, and made between John Cooke, the plaintiff's father, of the one part, and William Watson of the other part, after reciting that John Cooke, party thereto, was seised in fee of the premises, free from incumbrances, he demised the premises to Watson for 1,000 years by way of mortgage for securing 3,500*l.* with interest. In this indenture was contained a covenant, on the part of John Cooke, for the peaceable possession of the premises free from incumbrances, and the other usual covenants for title.

The plaintiff's father died about June 1807, intestate, leaving the plaintiff his eldest son and heir-at-law.

Sometime in the years 1815 or 1816 Watson died, having appointed the Rev. Henry Houson his executor. About November 1816, there being then the principal sum of 2,000*l.* due upon the mortgage to the estate of Watson, and the plaintiff being required to pay it off, contracted with the Rev. John Hall Clay for the sale to him of an annuity of 180*l.* in consideration of that sum; and thereupon, by an indenture dated the 9th of November 1816, and made between the plaintiff of the first part, Houson of the second part, Clay of the third part, Joseph Houson of the fourth part, and Richard Grose Burfoot of the fifth part, in consideration of 2,000*l.* paid by Clay to Henry Houson in discharge of the mortgage, the plaintiff granted out of the premises an annuity of 180*l.* to Clay. In this deed Henry Houson joined for the purpose of assigning the term of one thousand years to Burfoot, in trust for better

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securing the annuity, and subject thereto in trust for the plaintiff, and to attend the inheritance.

[\*157] \*By indentures of lease and release of the first and second of March 1818, and made between William Joseph Lockwood of the one part, and the plaintiff of the other part, after reciting the death of Elizabeth Child in or about the year 1741, and that Richard Lockwood departed this life in March 1797 without issue, leaving his elder brother the Rev. Edward Lockwood his heir-at-law, upon whom the legal trust estate of the premises devised by the will of the plaintiff's grandfather descended, the same not having passed by the will of Richard Lockwood, and further reciting the death of Edward Lockwood having made his will, but which did not pass the legal trust estate, and that Edward Lockwood had issue, William Joseph Lockwood his eldest son, who died in October 1801, leaving William Joseph Lockwood his only son and heir-at-law, upon whom the legal estate of the premises then descended; and that the plaintiff being desirous of obtaining a conveyance of such legal estate had requested William Joseph Lockwood to make such conveyance accordingly: William Joseph Lockwood conveyed the premises to the plaintiff and his heirs.

Affidavits had been made by the plaintiff and Henry Cooke his brother, and the solicitor employed by Clay, of which copies had been sent by the plaintiff's solicitor to the defendant's solicitors, and by which it appeared that the title deeds of the premises, and, amongst others, the indentures of the 24th and 25th days of May 1745, had been, a short time previously to the grant of the annuity, delivered by the solicitors of William Watson to the person who was the solicitor both of Henry Houson and Clay. It also appeared by the affida-

[\*158] vits that no payment or demand either of principal or interest \*in respect of the mortgage of the 25th day of May 1745 had been ever made upon plaintiff or upon his father. The plaintiff's solicitor had searched at Doctors Commons for the will or administration of Robert Johnson, and had also endeavored to find out his heir, but without success.

In an old abstract made in 1791 (upon the treaty for the loan of the 3,500*l.*) there was the following note. "N. B. This 300*l.* and all interest has been paid off near forty years, if not more, and the present Mr. Cooke in quiet possession ever since he attained twenty-one." And the conveyancer before whom the abstract was laid, wrote the following opinion on the title: "Although it does not appear that either the mortgagee reconveyed the real estate to Mr. Cooke, or that the surviving trustee in his father's will conveyed the equity of redemption to him, yet, from the assertion at the foot of the abstract (to which from my own personal knowledge the greatest credit is due,) and as a possessory action (unless under very particular circumstances indeed) cannot be brought after this lapse of time, I do not think a mortgagee will run any risk in accepting this title."

This abstract, and the note and opinion, had been shown to the defendant's

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solicitor, and was amongst the title deeds delivered by the solicitors of William Watson to the solicitor of Henry Houson and Clay.

The plaintiff submitted that, from these circumstances, it appeared that Richard Lockwood and Abigail Cooke had no right or power to make the mortgage except to the extent of the interest of Abigail Cooke, which had long since determined; and that, under the circumstances aforesaid, the defendant's objection to the title, on \*account of the mortgage of the 25th [\*159] of May 1745, was unfounded.

The defendant, by his answer, said that there was not in the abstract any statement of any deed, will or other document of title intermediate between the mortgage deeds of the 24th and 25th of May 1745, which were endorsed upon certain other indentures of the 31st of August and 1st of September 1736 and the mortgage in 1791, and that there was no receipt for the mortgage-money by the mortgagee indorsed upon these deeds, nor any evidence to show how long such deeds had been in the possession of the mortgagor: and, under such circumstances, he submitted that the heir or devisee of Robert Johnson, or the other persons in whom his estate might be vested were necessary parties to the conveyance.

Mr. Preston and Mr. Sidebottom for the plaintiff:—The mortgage in question was made so long ago as the year 1745. From that time down to the present, a period of nearly eighty years, there is no trace connecting it with Johnson in any shape whatever, nor is any thing heard of his interest. In 1754 the plaintiff's father came into possession; and it appears by the affidavit of Henry Cooke, the plaintiff's brother, that he assisted his father in the management of his affairs for twenty years previous to his decease: and, therefore, if any payment or demand of either principal or interest had been made he must have known of it. But he swears he never heard of any demand being made under this mortgage.

The fact that no administration can be found to this mortgagee, proves clearly that the mortgage-money had been satisfied. For if not, some person would have been \*induced to administer to the mortgagee [\*160] for the purpose of recovering it. In 1791, previous to making the mortgage to Watson, the title was investigated, and the opinion of counsel taken upon it, and he advised that the security might be accepted. At that time the deeds of 1745 were found in the hands of the mortgagor; and we trace him in possession for more than twenty years. If a mortgagee had filed a bill for a foreclosure stating circumstances similar to those of the present case, a plea or demurrer would have held good. In two cases, where a mortgagee stated his title so as to raise a doubt, the court has refused relief. *Christophers v. Sparke*,<sup>(a)</sup> and *Blewit v. Thomas*.<sup>(b)</sup> The same doctrine was held by Lord Thurlow in *Trash v. White*.<sup>(c)</sup>

If under the circumstances of the case this title is not good, it is impossible

(a) 2 J. &amp; W. 223.

(b) 2 Ves. jun. 663.

(c) 3 Bro. C. C. 209.

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to conceive how it can ever be made good. The personal representative of the mortgagee could not claim the money, nor the heir, the estate.

If an action were brought by the heir-at-law of the mortgagee to recover this estate, there is no judge who would not direct a jury to presume a reconveyance of the legal estate. If the mortgagee died without an heir, no jury would presume an escheat after a possession of seventy years. In *Hillary v. Waller*,<sup>(d)</sup> where there was no adverse possession, a reconveyance was presumed. This case however falls within the principle of *Emery v. Gracock*.<sup>(e)</sup>

The alleged object for raising the 300*l.*, was to enable the trustee [\*161] to perform the trusts of the will. But the trustee had no power to mortgage the estate for any such purpose; and, even with the concurrence of the tenant for life, he could only mortgage it for her life. Under all the circumstances of this case, and as a period of time has elapsed sufficient to destroy every kind of remedy, we submit that the objection to the title to these houses cannot be maintained, and that a specific performance ought to be decreed.

Mr. Sugden and Mr. Pemberton for the defendant:—The case before the court is not the case of mortgagor and mortgagee, but of vendor and purchaser. The doctrine of presumption as between mortgagor and mortgagee is one thing, and as between vendor and purchaser, another. In the case of mortgagor and mortgagee there is not any time in which the possession becomes adverse; for it is the practice for the mortgagor to remain in possession. A long possession, in order to be a ground for presuming a reconveyance, must be adverse. *Fenwick v. Reed*.<sup>(f)</sup> That case afterwards went to law, and the jury were of opinion that there were no grounds for presuming a release of the equity of redemption. If a mesne incumbrancer were to get a conveyance of the legal estate, it would be no objection to his availing himself of it, that the mortgage money had been paid. As to this mortgage being made by persons who had no title to make it, it appears that a mortgage was originally made by the testator, and after his death the mortgagees conveyed the estate to the trustees of his will, and they again mortgage to Johnson. So that this is the case of trustees of the equity of redemption who, having paid off the mortgage money, create another mortgage in fee for the purpose of enabling themselves [\*162] to perform the trusts of the will. That objection therefore will not hold. How do the plaintiffs prove that there was not a counterpart of the mortgage deed? If there were, and it was executed by all parties there is an end to the question. There were no intermediate deeds executed from 1745 to 1791; so that no aid can be derived from that circumstance. There is no indorsement on the deed of payment of either principal or interest. The plaintiffs did not choose to investigate the facts of the case in 1791, when they might have done so; but they waited until 1819, when Richard Lockwood was dead, and then took a reconveyance from his heir. At that time the legal

<sup>(d)</sup> 12 Ves. 239.

<sup>(e)</sup> 6 Madd. 54.

<sup>(f)</sup> 1 Mer. 114.

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estate was not in the heir of Richard Lockwood, but in the mortgagee; and therefore the reconveyance ought not to have been taken from him but from the mortgagee. The plaintiff says that it is unreasonable for the defendant to require a reconveyance from a person who acquired the legal estate in 1745, and yet he himself takes a reconveyance from persons whose interest vested in them in 1734. How can the plaintiff, with any consistency, insist upon the effect of presumption as against the defendant, when he takes a reconveyance of a prior title? Richard Lockwood, the surviving mortgagor; was alive at the date of the deed of 1791; but he was not made a party to that deed. This is an admission that at that time the legal estate was in the mortgagor. In the year 1818 the plaintiff takes a reconveyance from the heir of Richard Lockwood. It is clear, therefore, that the reconveyance must have taken place between 1791 and 1818. As to the authorities in regard to presumption there really are none. The case of *Hillary v. Waller* has not met with the approbation of the profession. And we beg to refer to what was said by the Lord Chancellor in the case of *Lord Cholmondeley v. Lord Clinton* \*in [\*163] the house of lords.(g) The case of *Emery v. Grocock* has no application to this; for there the term was created in 1711, and in 1744 a settlement was made and a recovery suffered, and it was therefore impossible for the settlement to have prevailed if the portions had not been paid.

The VICE-CHANCELLOR:—I adhere to the principle of *Emery v. Grocock*.

No reconveyance could ever be presumed without the actual production of the deed, unless it could be properly presumed in this case.[1]

(g) *See Vendors*, 425, 6th edition.

[1] *Vide Noel v. Bewley*, 3 Sim. 103.

# CASES IN CHANCERY

BEFORE

## THE VICE-CHANCELLOR.

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[\*165]

\*FOLJAMBE v. WILLOUGHBY.

1824, 4th November.—*Infant.—Maintenance.*

Where there are several funds provided by different persons for the maintenance of infants, the interest of the infants must alone determine which of the funds is first applicable.

THE plaintiffs were infants, and this suit was instituted for the purpose of having it determined out of which of several funds provided for the purpose, they were to be maintained and educated.

By a settlement, dated the 17th of October 1798, made upon the marriage of John Savile Foljambe, certain real estates were limited to the use of him for life, with remainder to the use of trustees for five hundred years, with remainder to the first and other sons of the marriage in tail, with the ultimate remainder to the use of John Savile Foljambe in fee. The trusts of the term of five hundred years were declared to be that, in case there should be an eldest son of the marriage and three or more younger children, the trustees should, by sale or mortgage, raise the sum of 5,000*l.* to be divided

[\*166] among the younger children, in such shares as \*the father should appoint; and, in default of appointment, equally; the portions of sons to be payable at twenty-one, or sooner, if the trustees, after the death of the father, should think proper, for their advancement; and the portions of daughters, at twenty-one or marriage, with benefit of survivorship in case any of the children died before their shares became payable; and, after the death of John Savile Foljambe, to raise, for the maintenance of the younger children, till their portions should become payable, such sums of money as the trustees should think necessary, not exceeding the interest of their portions at the rate of four per cent per annum.

John Savile Foljambe, by his will after ratifying the settlement and giving divers pecuniary and specific legacies, bequeathed all the residue of his personal estate to trustees, upon trust to pay, assign and transfer it unto and equally amongst all his younger children who should be living at the time of his decease, or be born in due time afterwards, share and share alike, the shares of sons to be paid at twenty-one, and of daughters, at twenty-one or marriage;

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1824.—*Foljambe v. Willoughby*.

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and, in the mean time, the dividends and interest to be applied by the trustees, at their discretion, towards their maintenance and education.

John Savile Foljambe died in 1805, soon after the date of his will, leaving issue of the marriage four children, of whom the three younger were infants, and were the plaintiffs in this suit.

After his death, his father, Francis Ferrand Foljambe, who was also a party to the settlement, made his will, dated in 1813, and by it devised certain real estates to \*trustees for a term of two hundred years, upon trust [187\*] to apply a sufficient part of the rents and profits, at their discretion, for and towards the maintenance and education of his four grandchildren, the children of his late son John Savile Foljambe, during their minorities, in such proportions and manner as the trustees should, in their discretion, think most advisable; and also upon trust, subject to the payment of certain debts and legacies to the plaintiffs and other persons, and also to the maintenance of the infants, to permit the person entitled for the time being to the estate in remainder immediately expectant on the term, to receive the rents and profits.

Francis Ferrand Foljambe died soon after the date of his will.

After the death of John Savile Foljambe, and until the death of Francis Ferrand Foljambe, the trustees and testamentary guardians of the plaintiffs received the interest of their portions under the settlement, and applied it, together with the interest of the residuary personal estate of John Savile Foljambe, in the maintenance and education of the plaintiffs.

The only fortunes to which the plaintiffs were entitled were the legacies of 5,000*l.* each under the will of their grandfather, and the provision made for them by the settlement and will of their father. George Savile Foljambe, the eldest son, was entitled to very large estates, which yielded him a yearly income of above 14,000*l.*

The bill, after stating these circumstances, charged that the grandfather of the plaintiffs intended that their \*maintenance should be provided for under the trusts of the term of two hundred years created by his will, and that the provision made for them by the settlement, and by their father's will should accumulate for their benefit; and that they had accordingly, since the death of their grandfather, been wholly maintained, under the trusts of the two hundred years term. It also stated that no account had ever been taken of the estate of their father, nor of the accumulations of it since the death of their grandfather; and that, in November 1822, the eldest of the plaintiffs attained the age of twenty-one years, and became entitled thereupon to have one third part of her father's residuary personal estate, and the accumulations thereof, and of her portion under the settlement, paid to her; but that the defendants, the trustees, refused to pay them to her, on the ground that these funds were to be considered as first applicable for her maintenance. It prayed that the rights and interests of the plaintiffs, and of George Savile Foljambe, their eldest brother, might be ascertained and declared, and proper accounts be taken for that purpose.



1824.—*Shewell v. Jones.*

The eldest son, by his answer, insisted that the income of the residuary personal estate of John Savile Foljambe, his father, was first applicable for the maintenance of the plaintiffs.

The cause now came on be heard.

Mr. *Heald*, and Mr. *Teed*, for the plaintiffs, contended that, according to the general principle on which the court acts towards infants, the funds must be applicable in the manner most beneficial to them; and, therefore that the provision made for the maintenance of the plaintiffs by their grandfather, [\*169] must be first applied, \*otherwise they would not have the full benefit of that provision; and they cited *Rawlins v. Goldfrap*.(a)

Mr. *Bell*, for George Savile Foljambe, the eldest son, argued that the fund provided by the will of the father, must be first applied; and that the provision made by the grandfather's will, was only in aid of that fund.

The VICE-CHANCELLOR :—The will of Francis Ferrand Foljambe has no manner of reference either to the settlement or will of John Savile Foljambe. It gives to the children of John Savile Foljambe an absolute independent right to call for maintenance from his estate.

Where there are two funds absolutely given by different persons for the maintenance of an infant, the interest of the infant must determine which of the two funds is to be applied.

Declare that the trustees of the term of two hundred years created by the will of Francis Ferrand Foljambe, are bound to supply a sufficient part of the rents and profits of the trust estate for the maintenance and education of the children of John Savile Foljambe; and, if the parties require it, refer it to the master to inquire what would be proper to be allowed in that respect.

[\*170]

\*SHEWELL v. JONES.

1824, 5th, 7th and 10th December.—*Receivers' accounts.*—*Practice.*

A master's report of a receiver's account, like his report on taxation of costs, does not require confirmation, and cannot be excepted to. But the court will enter into the consideration of objections to the general principle on which the master has proceeded in taking a receiver's account, but not of objections to particular items of it.

THE bill in this case was filed for the dissolution of a partnership between the plaintiff and the defendant.

By an order made in the cause, by consent, the partnership was declared to be dissolved, and it was referred to the master to appoint a proper person to collect and pay the debts due to and from the partnership, and to wind up its concerns; and it was directed that the person so to be appointed should pass his accounts before the master.

(a) 5 Ves. 440.

1824.—Shewell v. Jones.

The receiver's accounts were accordingly passed before the master, who reported a certain balance to be due from him.

The defendant then presented a petition, stating that the master had improperly allowed many sums, which were particularized in five schedules annexed to the petition, and also that the master had refused to permit the petitioner to exhibit interrogatories for the examination of the receiver, and of witnesses to substantiate his objections. The petition therefore prayed that the master might review his report, having regard to the objections taken by the petitioner; that certain items might be expunged from the account; and that the defendant might be at liberty to exhibit interrogatories for the examination of the receiver and witnesses.

Mr. *Sugden*, upon opening the petition, stated that he was informed that the master had considered that he \*had no jurisdiction to enter [\*171] into some of the petitioner's objections to the account, and had therefore declined to do so.

Mr. *Heald*, and Mr. *Bickersteth*, for the receiver.

Mr. *Treslove*, for the plaintiff.

7th December.—The Vice-Chancellor said that he had applied to the master, who certified to him that he had entered into and fully considered the petitioner's objections; and, further, that the petitioner had, in an early stage of the proceeding before him, obtained an order to examine the receiver upon interrogatories, and had accordingly proceeded to such examination as fully as he thought fit; and that, at the close of the business, the petitioner having desired to exhibit new interrogatories for the further examination of the receiver, the master had been of opinion that he could not admit them; and that, as to witnesses, the parties had proceeded before him by affidavit; and it was not until the close of the business that the petitioners had proposed to exhibit interrogatories for the examination of witnesses, which the master had refused doubting whether he had power under an interlocutory order, without special words, to send such interrogatories to the examiner; and being of opinion that, if he had such power, it was too late in the proceedings to admit them.

Mr. *Sugden*, and Mr. *Knight*, for the petitioner, were then proceeding to support the objection to the account, but were stopped by the Vice-Chancellor, who said that it was the first time he had heard of objections to a master's allowance of a receiver's account being brought before the court; and he apprehended that such a proceeding was not warranted by the practice of the court. \*The petition was therefore directed to stand [\*172] over, that the practice might be inquired into.

10th December.—The VICE-CHANCELLOR, delivered judgment on this day to the following effect:—Upon the opening of this petition, it appeared to me to be altogether novel, and I could not consider it to be justified by the practice of the court, because of the great inconvenience which would be the

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consequence of permitting any dissatisfied party to call upon the court to review every item of a receiver's account.

The master's report of a receiver's account, does not require confirmation, and does not admit therefore of exceptions. In this respect it resembles the master's report upon the taxation of costs; and the proceeding with respect to costs, affords, by analogy, a safe rule to be applied to this subject. In ordinary cases, the master's report upon the subject of costs, is final. But if it be thought that the master has in the taxation adopted some general principle which cannot be supported, the party complaining is entitled to bring that point before the court; and petitions of this nature are not unfrequent in practice.

The same rule is, for the same reason, to be applied to the case of receivers' accounts. The court will not enter into the consideration of any items of the account, but will, upon the petition of the party complaining, examine any principle upon which the master has proceeded, where error is imputed to him.

The present petition does not make such a case; and although it was suggested, at the bar, that the master had declined to enter into the merits [\*173] of some of the petitioner's objections, upon a supposed want of jurisdiction, which would have been the proper subject of an appeal to the court, yet, upon reference to the master, he informs the court that such suggestion is mistaken, and that he did fully enter into the merits of every objection taken by the petitioner.

With respect to the complaint, that the master refused to permit the petitioner to exhibit interrogatories for the examination of the receiver and witnesses, it now appears that the petitioner did fully examine the receiver upon interrogatories, and that the master refused a second examination at the close of the business; and that the master, doubting whether he had jurisdiction to examine witnesses at all upon interrogatories, was of opinion that it was at all events too late to enter into that examination when the request was made by the petitioner.

I concur with the master in both these points. The petition must therefore be dismissed; and I cannot refuse the receiver his costs.[1]

[1] Aff. 3 Russ. 522. The same practice was adopted by the V. Ch. in *Brower v. Brower*, 2 Edw. 621. There is no general rule as to the allowance to a receiver; but it depends on the degree of difficulty or facility experienced in the collection; and where the master allowed the receiver five per cent. on considerable receipts composed of large sums, due for annuities, mortgages, rents, &c. the report was referred back for review; *Day v. Croft*, 2 Beav. 488.

1824.—Hume v. Rundell.

\*HUME v. RUNDELL.

[\*174]

1824, 11th Dec.—*Settlement.—Construction.—Election.*

By the settlement on the marriage of J. H. with C. R. portions were to be raised for the younger children of J. H. by C. R. or any future wife, but not to be paid until after the decease of J. H., C. R., or such future wife, though no estate was given to such future wife; and power was given to J. H. to appoint the interest of the portions to be raised for the children's maintenance; and on his default the same power was given to the trustees, and the maintenance was directed to be paid on the first quarter-day after the decease of the survivor of J. H., C. R., or such future wife. J. H. died, leaving his second wife surviving, and by his will, which was not duly attested, directed the maintenance to be raised from the time of his death, and gave other benefits to his eldest son: held, the trustees had no power to allow maintenance during the second wife's lifetime; but that the eldest son should be put to his election, as he had other benefits under the will, and was the only party that could be benefited by withholding the maintenance.

ONE of the questions in this cause was, whether Catherine Ann Hume, one of the daughters of James John Hume, was entitled to receive any part of the interest of her portion for her maintenance, before the principal was payable.

By the settlement on the marriage of James John Hume with Catherine Randolph, the manor of Barwick Hall, in Essex, was limited to the use of trustees for five hundred years, in remainder expectant upon the decease of the survivor of James John Hume and Catherine Randolph, upon trust, if there should be any children of James John Hume by Catherine Randolph, or by any after-taken wife, other than an eldest or only son, then, after the decease of the survivor of James John Hume and Catherine Randolph, or in the life-time of them, or the survivor of them, if they, he or she, or any such future wife, should so direct, to raise by the usual means 5,000*l.* for the portions of such children, that sum to be a vested interest, and to be paid to them at such ages, in such manner, shares and proportions as James John Hume should by deed, or by his will, to be signed and published by him, and attested as therein mentioned, direct; and in default of such direction, the 5,000*l.* to be divided amongst the children in equal \*shares, and the shares to be [\*175] vested in them at the usual times, but not to be paid until after the decease of the survivor of James John Hume and Catherine Randolph, or any such future wife; and it was thereby declared, that it should be lawful for the trustees, at any time after the decease of the survivor of James John Hume and Catherine Randolph, or such future wife, or in the life-time of them, or the survivor of them, in case they, he or she should so direct, to raise any part of the portions intended to be thereby provided for such younger sons and daughters, not exceeding in the whole, for any one such child, one moiety of his or her then expectant portion; and to apply the money so to be raised for the preferment and advancement in the world, or otherwise for the benefit of such child, in such manner as the trustees should think proper, notwithstanding the portion of such child should not then have become vested or payable; and that the trustees should, after the decease of the survivor of James John Hume and Catherine Randolph, or any after-taken wife, out of the rents of the manor,

1824.—*Hume v. Rundell.*

raise for the maintenance and education of the children for the time being of James John Hume, by Catherine Randolph, or any after-taken wife, for whom portions were intended to be thereby provided, and till their portions should become payable, such yearly sums of money as James John Hume, at any time during his life, should by deed, or by his will, to be signed by him and attested by three witnesses, direct : but not exceeding in any one year what the interest of such portions would amount to, at the rate of five per cent ; and, in default of such direction, then such yearly sums of money, not exceeding the amount of such interest, as the trustees should think fit, such yearly sums to be raised and paid by four equal quarterly payments on the days therein mentioned ; \*and the first of the said quarterly payments to be made on such of those days as should happen next after the decease of the survivor of James John Hume and Catherine Randolph, or such future wife as aforesaid. Subject to this term, the manor was limited to the use of the first and other sons of James John Hume, by Catherine Randolph, successively, in tail male, with remainder to his first and other sons by any after-taken wife, successively in tail male.

James John Hume, by his will, after reciting the settlement, and the power thereby reserved to him of appointing the 5,000*l.* and that there was issue of his marriage with his late wife Catherine, one child, Catherine Ann Hume, and, of his marriage with his then wife Lydia, William Edward Hume, John Lloyd Hume, Caroline Mary Hume, and Henry Hume, in exercise of the power, appointed 4,000*l.* part of the 5,000*l.* in trust for Catherine Ann Hume, her executors, administrators and assigns, and to become an interest vested in her when she should attain the age of twenty-one years, or be married under that age with the consent of her guardians ; and the sum of 1,000*l.* the residue of the 5,000*l.* intrust for John Lloyd Hume, Caroline Mary Hume, and Henry Hume, in equal shares ; and the same to become an interest vested in such children, at such and the same ages, days or times as were expressed in the settlement concerning the shares thereby intended and provided for his children by his late wife, Catherine, or any after-taken wife ; and he thereby further directed that the yearly dividends and annual produce of the respective shares of his children in the 5,000*l.* should, until such shares should, under the settlement or his will, become an interest vested in them, be applied for their maintenance and education ; \*and he gave a copyhold-estate, and certain parts of his personal estate, to his eldest son, William Edward Hume.

Mr. *Held*, and Mr. *Wheatley*, for the plaintiff Catherine Ann Hume.

Mr. *Sudgen*, and Mr. *Beames*, for the defendant William Edward Hume.

Mr. *Barber*, for the trustees.

The VICE-CHANCELLOR :—The question is, whether it be the true construction of this settlement that the trustees of the term for raising portions for younger children have authority, until such portions become payable, to levy and raise

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1824.—Hume v. Rundell.

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annually, for their maintenance and education, sums not exceeding the interest of their portions.

In the construction of all instruments it is the duty of the court not to confine itself to the force of a particular expression, but to collect the intention from the whole instrument taken together. But a court is not authorized to deviate from the force of a particular expression, unless it finds, in other parts of the instrument, expressions which manifest that the author of the instrument could not have the intention which the literal force of a particular expression would impute to him. However capricious may be the intention which is clearly and unequivocally expressed, every court is bound by it, unless it be plainly controlled by other parts of the instrument.

To apply these principles to the present case:—It cannot but be considered as so unreasonable that the plaintiff should, under the actual circumstances, be without any provision for her maintenance and education during the life of her stepmother, that it is \*difficult to believe that such [\*178] was the intention of the settlement made on the first marriage; and, if the court could act upon conjecture, it would declare against such intention. But such intention being clearly and unequivocally expressed in the clause of maintenance, and there being no expressions in any other part of the settlement which manifest a different intention in this respect, I feel myself bound to declare that the trustees under the settlement have no authority, during the infancy of the plaintiff and the life of the stepmother, to raise any provision for the plaintiff's maintenance.

If this case had come before the court upon a bill to reform the settlement upon the ground of mistake in the drawer of the instrument, it seems highly probable that evidence might have been found which would have justified a decree in favor of the plaintiff.

There appears to me, however, to be another view of this case, which has not been suggested at the bar, which may secure maintenance to the plaintiff wholly or in part. The father's will expressly gives it to her; and though he had no power to do so under the settlement, yet his will may effect his purpose by way of election: although the two testamentary instruments will not pass freehold estates, they will certainly pass copyhold estate and personal property. Upon looking through the first testamentary instrument it will be found that the testator gives to his eldest son, who will alone benefit by the withholding of maintenance from the plaintiff, an interest in copyhold and in personal property; and the eldest son cannot take under the will without confirming the will. There must, therefore, be a reference to the master to see whether it is for his benefit to elect to take under or against the will.

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 1824.—Long v. Ricketts.
 

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[\*179]

\*LONG v. RICKETTS.

1824, 13th December.—*Devise.—Restraint of marriage.*

Devise of an estate to trustees, upon trust to pay the rents and profits to the testator's son I. while unmarried, and to convey to him, in case of his marriage with the consent of the trustees; but in case he should marry against their consent, then to sell the estate and divide the proceeds among other persons. The son having married without the knowledge of the trustees, both of whom disapproved of the marriage when they were informed of it: held that, the marriage having been had without the consent of the trustees, though not against their consent, the devise over took effect.

SAMUEL LONG, by his will, dated in May 1801, devised certain real estates to his wife, for her life, and, after her decease, to John Vizard and James Ricketts, their heirs and assigns, upon trust, as long as his son John Long should continue unmarried, to demise the estates, and receive the rents and profits thereof, and pay the same to John Long: and in case of his marriage with the consent of Vizard and Ricketts, or the survivor of them, or his heirs, (save as to his marrying Elizabeth Warner,) then in trust to convey the estates to him, his heirs and assigns; but in case he should marry Elizabeth Warner, either with or without the consent of his trustees, or should marry any other woman against the consent of them or the survivor of them or his heirs, then in trust to convey the same estates to his son, Samuel Long, his heirs, executors, administrators and assigns; and then, in lieu of those estates, he gave to his son John the sum of 200*l.* to be paid to him by Samuel out of the estate, which he thereby charged with the payment thereof accordingly, and directed it to be paid six months after Samuel, his heirs, administrators or assigns should become entitled to the estates.

The testator by a codicil, after reciting that his son Samuel Long was lately dead, declared, that in case his son John should intermarry with Elizabeth Warner, either with or without the consent of the trustees, or the survivor of them, or his heirs, or should marry any other woman against their  
 [\*180] consent, or the consent of \*the survivor of them, or his heirs, then he gave his estates, after the death of his wife and the marrying of his son John contrary to his wish and the conditions expressed in his codicil and will, to the trustees, their heirs, executors and assigns, upon trust to sell the same, and to stand possessed of the money to be thereby produced, upon trust to divide it among certain other persons named in the codicil.

The testator died in 1804. In 1805 his son John intermarried with Sarah Picton, who had lived with the testator as a servant, but had left his service some time before his death; but he did not, prior to his marriage, communicate his intention to either of the trustees, and the marriage took place without their knowledge; but as soon as they heard of it, they expressed their disapprobation of it.

Vizard died in January 1814. In April following, Ricketts served the following notice upon John Long. "I hereby give you notice that your marriage with your present wife, Sarah Long, late Sarah Picton, was against my

1824.—*Long v. Ricketts*.

consent and approbation, and against the consent and approbation of John Vizard, deceased, my co-trustee named in the last will and testament and codicil of your late father Samuel Long; and that, in consequence of such your marriage with your said wife, I consider the messuage, lands, &c. from and after the decease of your mother, liable to be sold and disposed of and converted into money, and the produce arising therefrom to be paid and applied to and among the several persons, and upon the several trusts and purposes mentioned, declared and expressed in the will and codicil of your late father."

\*In 1818 John Long died, leaving Sarah Long, his widow, and [\*181] several children by her surviving him.

The bill was filed against J. Long's children and personal representative, by the persons to whom the estate was given, by the codicil, on the marriage of John Long without the consent of the trustees. It prayed that the estates might be sold, and the produce distributed amongst the plaintiffs.

When the cause was heard, the Vice-Chancellor referred it to the master to inquire whether John Long married Sarah Picton with the consent of the trustees, or either of them; and whether they, or either of them, were acquainted with the fact of the intended marriage before it took place; and whether they, or either of them, approved or disapproved of such intended marriage: and, if he should find that the trustees, or either of them, were or was not acquainted therewith before it took place, then to inquire when they became respectively acquainted with the fact of the marriage; and whether, after becoming acquainted therewith respectively, they approved or disapproved of the same, and when, and under what circumstances.

The master reported that John Long did not marry Sarah Picton with the consent of the trustees, and that they or either of them were not acquainted with the fact of the marriage before it took place: that no evidence had been laid before him to enable him to ascertain when the trustees respectively became acquainted with the fact of the marriage; but, that when they did become acquainted with it, Ricketts disapproved of it, because Sarah Picton was in a humbler sphere of life than John Long; but that no evidence had been laid before him to \*show when Ricketts first disapproved [\*182] of the marriage, or that Vizard ever disapproved of it.

The cause now came on to be heard for further directions.

Mr. *Bell*, and Mr. *Koe*, for the plaintiffs:—The consent of the trustees to the marriage of John Long, is a condition precedent: and, if it has not been complied with, no estate became vested in him. It is quite clear, upon the master's report, that the condition was not performed. A difference has been taken between real and personal estate, as to the force and efficacy of such conditions; but there can be no doubt that they are effectual as to real estate. *Scott v. Tyler*; (a) *Mansell v. Mansell*; (b) *Fry v. Porter*; (c) *Stackpole v. Beaumont*; (d) *Harvey v. Aston*; (e) *Clarke v. Porter*. (f)

(a) 2 Bro. C. C. 431.

(c) 1 Mod. 300.

(b) Cited in *Scott v. Tyler*, 2 Bro. C. C. 473; also in 2 Dick. 712.

(d) 3 Ves. 98.

(e) 1 Atk. 461.

(f) 19 Ves. 1.



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 1825.—*Amburst v. King*.
 

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Mr. *Combe* for the trustees.

Mr. *Heald* and Mr. *Twiss*, for the children of John Long :—The testator does not exclude John Long, in case he lived and died a bachelor ; but only devises the estate over in case of his marriage against the consent of the trustees. It is not therefore quite correct to describe this as a condition precedent. By the codicil, the trustees have no power to sell the estate, unless John Long married against their consent. The doctrine of conditions does not apply to such a case as the present. *Boraston's case* ; (g) *Hook v. Taylor*. (h) [\*183] This case \*is distinguished from others, by there being no direct devise over in case of a marriage against the consent required.

The VICE-CHANCELLOR :—In this case, to entitle himself to the estate after marriage, John Long must marry with the consent of the trustees ; and he has not performed that condition precedent.[1]

To make the will consistent, the word “against” here must be read in the sense of “without.”

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#### AMHURST v. KING.

1825, 17th January.—*Pleading*.—*Answer*.

An answer as to matters to which the defendant was not alleged to be privy, that they might be true for any thing he knew to the contrary, followed by an averment that he was a stranger to, and could not form any belief respecting them, is sufficient.

THE defendant, to several statements in the bill as to transactions to which he was not, nor was alleged to be, privy, answered in the following form : “And this defendant further answering saith it may be true, for any thing this defendant knows to the contrary, that, &c.,” and, after going through the several statements, he concluded thus : “But this defendant is an utter stranger to all and every such matters, and cannot form any belief concerning the same.”

The plaintiff excepted to this part of the answer ; and the master having overruled the exception, he excepted to the master's report. Upon the hearing of the exception, Mr. *Kos*, for the plaintiff, contended that the defendant ought to have answered as to his information as well as to his belief, according to the requisition of the bill. But the Vice-Chancellor was of opinion [\*184] that \*the defendant, in stating himself to be an utter stranger to all and every the matters in question, did answer as to his information, and did, in effect, deny that he had any information respecting them.

Exception overruled.[2]

(g) 3 Rep. 19.

(h) 2 Vern. 561.

[1] Vide *Duffield v. Elwes*, 1 Sim. & Stu. 239.

[2] Vide *Wharton v. Wharton*, 1 Sim. & Stu. 235, and note *ibid*.

1825.—Douglas v. Horsfall.

DOUGLAS V. HORSFALL.

1825, 17th January.—*Pleading*.—*Parties*.

Demurrer allowed to a bill for the specific performance of an agreement for a lease entered into by the trustees of a numerous company for the use of the company, because none of the members of the company were parties to the bill.

THE bill prayed for a specific performance of an agreement for a lease made by the plaintiffs with the defendant. It stated that the plaintiffs were trustees for the Portable Gas Company; that that company consisted of a great number of persons; that the plaintiffs, by Yelloly their agent, entered into the agreement for the use of the company; that a draft of the lease was delivered to the plaintiffs' solicitor, with blanks left for the names of the lessees; and that the solicitor filled up the blanks with the names of the plaintiffs; but it did not state that the plaintiffs were members of the company, nor were any of the members made parties to the suit; and, under those circumstances, the defendant demurred to the bill.

Mr. *Heald*, and Mr. *Spence*, for the plaintiffs:—It was not necessary to make any of the members of the company parties to this bill, because the plaintiffs were to be the only lessees. There was no privity between them and the company. Yelloly was their agent, and not the agent of the company. The blanks in the draft were filled up with the names of the plaintiffs, therefore it was a complete agreement for a lease to them, not as trustees, but in their individual capacities. \*The company could not object to the [\*185] lease being granted to the plaintiffs, but they might have said they would not be bound by a lease to which they were not parties. In *Cullen v. The Duke of Queensberry*,<sup>(a)</sup> the court acted upon an agreement of this nature, where the persons who entered in it were the only parties to the suit.

The VICE-CHANCELLOR:—The object in that suit was merely to obtain payment of a sum of money; the defendants were left to obtain contribution as they could.

Mr. *Horne*, for the demurrer, said that a trustee could not file a bill respecting the trust property without making the *cetui que trust* a party: and that here, the society being so numerous that it was not practicable to make all the members parties, the bill ought to have been filed by some of them on behalf of themselves and the others; but that it did not appear by the bill that the plaintiffs were even members of the society; and on these grounds, the Vice-Chancellor allowed the demurrer.[1]

(a) 1 Bro. C. C. 101.

[1] Vide, *Baldwin v. Lawrence*, ante 18, 26 and note, *ibid*.

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 1825.—Bird v. Brancker.
 

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[\*186]

\*BIRD v. BRANCKER.

1825, 24th January.—*Practice.—Injunction.—Notice of Trial.*

It is not irregular for the defendant's solicitor to be one of the commissioners for taking the answer. Giving a notice of trial is a breach of an injunction to stay trial.

THE plaintiff moved that the answer of the defendant might be taken off the file, because the solicitor of the defendant had been one of the commissioners to take the answer.

Mr. Agar, and Mr. Kindersley, in support of the motion, said that they had not been able to find any authority directly in point: but that the principle upon which affidavits were not allowed to be sworn before the solicitors of the persons making them, was applicable, and that, if the practice objected to were allowed to prevail, a solicitor, knowing that the answer contained what was untrue, might administer the oath improperly.

Mr. Horne opposed the motion.

On the following day, the Vice-Chancellor read in court a certificate, signed by several clerks in court, stating it to be the practice that the solicitor of a defendant might be a commissioner to take his answer; and the motion was refused.

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In the same cause the plaintiff moved that the solicitor of the defendant might be committed for a contempt, in giving a notice of trial after an injunction had been obtained to stay trial. There was added to the notice, that it was to be considered as nugatory, unless the injunction should be dissolved previous to the day of trial.

[\*187] \*Mr. Horne supported the motion.

Mr. Agar and Mr. Kindersley opposed it.

They said that, if a notice of trial might be given pending the injunction to restrain the trial, the plaintiff would be compelled to have his witnesses ready, and the court might ultimately be of opinion that the injunction ought to be continued, and that taking a step that was preliminary to doing the act restrained, was as much a breach of the injunction as doing the act itself.

The Vice-Chancellor stated that the plaintiff in equity, not being compelled to go to trial before he had seen the defendant's answer, it was not reasonable that he should be compelled to prepare for trial before he had seen the answer. And, the next day, he stated that it was the opinion of the most experienced officers of the court, that a notice of trial was a breach of the injunction to stay trial. The defendant was ordered to withdraw the notice of trial, and to pay the costs of the motion.

[\*188]

\*ELEY v. BROUGHTON.

1825, 24th January.—*Subpoena.—Defendant.*

Ordered that a defendant, a female infant not baptized, should be described in the subpoena as the youngest female child of her father and mother.

1825.—*Eley v. Broughton.*

A FEMALE infant, who was born pending the suit, was a necessary party to the suit, and her parents, in order to interpose difficulties in the way of prosecuting the suit, had refused to have her baptized. The question was, how she was to be described in the subpoena to appear and answer.

The Vice-Chancellor, on the motion of Mr. *Pemberton*, ordered, that the infant should be described as the youngest female child of her father and mother.

GARTH v. THOMAS.

1825, 24th January.—*Foreclosure.—Bankrupt.*

Where a mortgagee becomes bankrupt, and a bill of foreclosure is filed against him and his assignees, the court will not, on the application of the assignees alone, make an immediate decree under 7 Geo. 2, c. 20.

THIS was a bill of foreclosure. After the suit was commenced, the defendant, the mortgagor, became bankrupt. A supplemental bill was then filed against his assignees. They now moved for an immediate decree, under the 7th Geo. 2, c. 20, s. 2.(a)

\*Mr. *Knight* appeared in support of the motion.

[\*189]

The VICE-CHANCELLOR :—If this cause proceed regularly to a hearing, the decree will give the right of redemption to the bankrupt, as well as to the assignees; and therefore without the consent of the bankrupt an immediate decree cannot be made under the statute.

(a) This section is as follows: "And be it further enacted, by the authority aforesaid, that, from and after the said first day of Easter term 1734, where any bill or bills, suit or suits, shall be filed, commenced or brought in any of his majesty's courts of equity, in that part of Great Britain called England, by any person or persons having or claiming any estate, right or interest in any lands, tenements or hereditaments, under or by virtue of any mortgage or mortgages thereof, to compel the defendant or defendants in such suit or suits (having or claiming a right to redeem the same,) to pay the plaintiff or plaintiffs in such suit or suits the principal money and interest due on any such mortgage, or the principal money and interest due on such mortgage, together with any sum or sums of money due on any incumbrance or specialty charged or chargeable on the equity of redemption thereof; and, in default of payment thereof, to foreclose such defendant or defendants of his, her or their right or equity of redeeming such mortgaged lands, tenements or hereditaments; such court or courts of equity where such suit or suits shall be depending, upon application made to such court by the defendant or defendants in such suit, having a right to redeem such mortgaged lands, tenements or hereditaments, and upon his or their admitting the right and title of the plaintiff or plaintiffs in such suit, may and shall, at any time or times before such suit or cause shall be brought to hearing, make such order or decree therein as such court or courts might or could have made therein, in case such suit or cause had then been regularly brought to hearing before such court or courts; and all parties to such suit or suits shall be bound by such order or decree so made, to all intents and purposes, as if such order or decree had been made by such court at or subsequent to the hearing of such cause or suit; any usage to the contrary thereof in anywise notwithstanding."

[\*190]

\*WEBSTER v. THRELFALL.

1825, 26th January.—*Answer*.—*Sufficiency*.—*Impertinence*.

The bill alleged that a bill of exchange held by the defendant was an accommodation bill, and required him to set forth the particulars of the consideration pretended to be given for it: the answer denied the allegation, and stated that the bill of exchange was paid to the defendant in the regular course of his business as a banker, and that the consideration did not consist of any specific sum, but of cash from time to time drawn out by the payer: Held that this was a sufficient answer, and that it would have been impertinent in the defendant to set forth the general banking account.

THE object of this bill was to have certain bills of exchange, which had been accepted by the plaintiff, delivered up to him to be cancelled. It stated that, in 1821 one Dentith, who had since become a bankrupt, and the defendants Threlfall, a banker, Bird, a bill-broker, and Johnson, a merchant, had had dealings together in the way of raising money for their own accommodation; that Dentith requested the plaintiff to accept two bills of exchange, which he said had been drawn for the accommodation of himself, Threlfall and Bird, and assured the plaintiff that either he or they would pay them when due; that the plaintiff complied with this request, and that Dentith afterwards indorsed and delivered the bills to Threlfall and Bird, without consideration; and it required Threlfall, if he should pretend that he had given a consideration for the bills, to set forth the nature and amount of it, of what it consisted, how much was given for each bill, when, by whom, to whom, where and in whose presence it was paid, and whether in notes, or bills, or cash, and how much in notes, and how much in cash, and the dates of such bills or notes, and upon and by whom drawn, and by whom payable; and it contained the usual allegation that the plaintiff had books and other documents in his possession relating to the matters in the bill.

Threlfall, in his answer, denied that he had had any transactions with Dentith, except banking transactions and some discount transactions; and [\*191] said, that in \*September 1820, Dentith opened a regular banking account with him, since which time he had not discounted any bills for Dentith; he denied that he had had any dealings either with Dentith, Bird or Johnson in the way of raising money for their accommodation; and he also denied all the other circumstances under which the bills were stated to have been accepted. He said that Bird paid the two bills of exchange into his banking-house, together with others, in the regular course of the defendant's business as Bird's banker; and that, as they were paid in, they were placed to Bird's credit in his banking account with the defendant, which then was and still continued to be an open running account; that he had given a valuable consideration for the bills; and that it consisted of cash, bills of exchange and notes to the full amount thereof, drawn out of his banking-house by Bird, promiscuously, from time to time, as Bird's occasions required, according to the regular course of dealing between bankers and their customers; but that no cash, bills or notes were drawn out by or paid to Bird on account, or as considerations for the bills, specifically. He said that he had in his possession a ledger and other

1825 — Webster v. Threlfall.

books containing a list of the several bills received by him in the course of his business since March 1820, and that he was unable to set forth, except as before stated, and as appeared by the accounts contained in his ledger and day-book, the particulars of the consideration given by him for the bills; and that the plaintiff's solicitor had inspected and taken copies of, and made extracts from those accounts, and that the books were still open for his inspection.

The defendant took the following exception to the answer: "for that the said defendant, John Threlfall, hath \*not, in manner aforesaid, [\*192] set forth the nature and amount of the consideration paid by him for the delivery to him of the several bills of exchange in the said bill mentioned, and of what in particular the same and each and every part thereof consisted, and how much in particular for each of such bills, and when, and by whom, and to whom by name, and where, and in whose presence the same and each and every part thereof were and was paid, and whether in notes and bills, or cash, and how much in notes, and how much in cash, and the dates of such bills or notes (if any,) and upon and by whom drawn, and by whom payable."

The master allowed this exception. The defendant then excepted to the master's report; and that exception now came on to be heard.

Mr. Bell, and Mr. Spencer, for the defendant:—The defendant, being a banker, could not answer this interrogatory without setting forth the accounts. The proper course to be pursued by a defendant in such a case is, not to set forth his accounts, *verbatim*, from beginning to end, but to refer to his books. The distinction taken by the solicitor-general, in arguing the case of *Alsagar v. Johnson*, (a) is correct. He says, "the true distinction is, that a defendant is not to refer to accounts made out for the purpose of the cause; but he may refer to those things which were in existence previously to the cause."

Mr. Koe, for the plaintiff:—It is immaterial whether the defendant acted as Dentith's banker, or stood in any other relation to him. The rule must be the same in both cases; for the \*defendant might have been [\*193] banker to Dentith as to the particular transaction only. It is quite consistent with this answer, that the defendant had given no valuable consideration for the bills. He says that the consideration consisted of cash, bills, of exchange and notes to the full amount, drawn out of the bank, but does not state that the notes were paid, or that the accounts will show the dates of the bills. He does not point out what parts of his books relate to this transaction. It is not sufficient for a defendant, who is required to set forth the consideration given for a bill of exchange, to refer to voluminous accounts.

The VICE-CHANCELLOR:—The bill supposes a case in which a distinct consideration might be paid, or be alleged to be paid, by the defendant, for these bills; and requires all the particulars of such distinct consideration to be set forth by the defendant. When it appears that no distinct consideration was paid for these bills, but that they formed items in a general banking account of great

1825.—*Holland v. Eyre.*

length, I think that the defendant was not only not required, but that he would not have been justified in setting forth all the particulars of all the payments which he made on the general banking account, and thus imposing upon the plaintiff the expense of taking copies of an account which he had not sought. If, upon the coming in of such an answer, the plaintiff should think it would be useful to him to call for copies of the general banking account, he could readily amend his bill accordingly. In this view of the case, it was not necessary for the defendant to have referred to his banking books; but, because he has unnecessarily referred to them, he is not therefore bound to set forth the contents in his answer.

Exceptions allowed.[1]

[\*194]

\*HOLLAND V. EYRE.

1825, 26th January.—*Agreement.*

In order to constitute an agreement by letters, the answer to the written proposals must be a simple acceptance of the term proposed, without the introduction of any new or different term.

THE bill stated that the plaintiff had agreed with Mr. Burton, who was lessee under the crown, to take a lease from him of a house in the Regent's Park, being No. 5, in Cornwall Terrace, for a term, of which ninety-seven years were unexpired in April last; and being afterwards desirous to sell the house for the remainder of the term, and the defendant being informed thereof, and of the plaintiff being entitled to the lease from Burton, wrote to the plaintiff a letter, in the words following: "April 21st, 1821.—Sir, I propose to give you for the lease of ninety-seven years, of No. 5, Cornwall Terrace, subject to the ground rent, which I understand you pay, of 50 guineas, the sum of 2,750*l.*, you making all the glass perfect. Henry Eyre."

The plaintiff, in answer, wrote to the defendant the following letter: "21st April, 1824.—Sir, I accept your offer of 2,750*l.* for No. 5, Cornwall Terrace, subject to the ground rent of 50 guineas, and to grant a lease of it on the same terms and clauses as the lease I hold from Mr. Burton. S. A. Holland.—P. S. I will make good the cracked glass."

The bill prayed a specific performance of the agreement alleged to be formed by the two letters, and that the defendant might be decreed to pay to the plaintiff the 2,750*l.*, and to accept and execute a counterpart of a lease of the house, according to the true intent and meaning of the agreement.

[\*195] \*The defendant put in a general demurrer to the bill, which now came on to be argued.

Mr. *Seymour*, in support of the demurrer, said that the defendant in his letter proposed to take from the plaintiff an assignment of the lease which the latter was entitled to under his agreement with Burton; but that the plaintiff

[1] Vide *Parker v. Fairlie and others*, 1 Sim. & Stu. 295, 301, and note, *ibid.*

1825.—*Handford v. Storie.*

in his answer offered to grant to the defendant an under-lease, which was a very different thing, and not so beneficial to the defendant; as it would impose on him the necessity of inquiring, before he paid his rent to the plaintiff, whether the plaintiff had paid his rent to Burton, and whether Burton had paid his rent to the crown; and he cited *Huddleston v. Briscoe*.(a)

Mr. *Sugden*, in support of the bill, contended that the plaintiff's letter contained a clear acceptance of the defendant's offer, and expressed his willingness to give to the defendant what the defendant had proposed to take, namely, an assignment of the lease which the plaintiff was entitled to from Burton.

The VICE-CHANCELLOR:—In order to constitute an agreement by letters, the answer to the written proposal must be a simple acceptance of the terms proposed, without the introduction of a new and different term.[1] The defendant proposes to give the sum mentioned in his letter for the lease of the house, by which is to be understood the lease which the plaintiff had or was entitled to claim from Mr. Burton. The plaintiff, in his answer, does not consent to assign the lease from Mr. Burton on the terms proposed; but offers, on those terms, to grant \*an under-lease, on the same terms [\*196] and clauses as the lease he holds from Mr. Burton. But the grant of an under-lease is not the same thing as the assignment of an original lease; and the plaintiff's letter is not therefore an acceptance of the defendant's proposal, but introduces into the treaty a new and different term.

Demurrer allowed.

#### HANDFORD V. STORIE.

1825, 26th & 27th January.—*Creditor's suit.*

Where a plaintiff files a bill on behalf of himself and all other persons of the same class, he retains the absolute dominion of the suit until the decree, and may dismiss the bill at his pleasure; but after a decree he cannot deprive the other persons of the same class of the benefit of the decree, if they think fit to prosecute it.

A creditor who had filed a bill, on behalf of himself and all other creditors, against trustees to whom estates had been conveyed for payment of the debts, having, in consideration of payment of his debt by an agent of the debtor, dismissed the bill before any decree, although he was paid out of the trust fund, a bill filed by another creditor, on behalf of himself and all other creditors, against the plaintiff in the first suit and the trustees, for recovery of the sum paid to him, was dismissed with costs, it appearing that the trustees gave no authority for the payment out of the trust fund, and that he did not know that he had been paid out of that fund.

THE Marquis of Headfort, and Lord Bective his son, had granted debentures to several of their creditors, and afterwards conveyed certain estates to trustees, upon trust to pay those debentures.

The defendant Storie was a holder of one of the debentures, and had filed a bill, on behalf of himself and all the other holders of such debentures,

(a) 11 Ves. 583.

[1] Aoc. *Hyde v. Wrench*, 3 Beav. 334.



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1825.—*Handford v. Storie.*


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against Lord Headfort, Lord Bective and the trustees, praying for an account and payment. In order to put an end to this suit, Lord Bective, through Mr. Ball his agent, agreed to purchase Storie's debenture, upon terms very advantageous to the latter. Accordingly Ball, who was the receiver of the [\*197] trust estates, paid to Storie the sum \*agreed upon out of the rents in his hands, and the bill was dismissed before any decree was made upon it. Ball had had no authority from the trustees to pay this sum out of the rents, nor did Storie know that it had been so paid, but considered that it had been advanced by Lord Bective.

The present bill was filed by another debenture creditor, on behalf of himself and all the other debenture creditors, against Mr. Storie, Mr. Ball, Lord Headfort, Lord Bective, and the trustees; and it prayed that Mr. Storie might repay to the trustees the moneys which he had so received from Ball, in order that the same might be duly distributed under the trust deed; and that Lord Bective and Mr. Ball, as well as Mr. Storie, might be answerable to the trustees for those moneys.

This cause now came on to be heard.

Mr. Hart, and Mr. Pemberton, for the plaintiff, argued that Mr. Storie, having used the suit instituted for the general benefit of the debenture creditors in order to obtain a particular advantage to himself from the trust property, was not at liberty to retain that advantage; and that, if this was not to be considered as an advantage obtained from the trust property, yet he could not use the suit instituted for the common benefit of the debenture creditors as an instrument to obtain terms advantageous to himself.

Mr. Horne, and Mr. Roupell, for the defendant Storie.

Mr. Sugden for the defendant Lord Bective.

Mr. Wilbraham for the defendant Ball.

Mr. Norton for the trustees.

[\*198] \*The VICE-CHANCELLOR :—If Mr. Storie had entered into a contract with the trustees, to be paid out of the trust moneys, to the prejudice of the other creditors, this would have not only been a breach of trust on the part of the trustees, but Mr. Storie could not have been permitted to retain the moneys which he had thus improperly acquired.

Mr. Storie's contract was, however, a personal contract with Mr. Ball, as the agent of Lord Bective, and not with the trustees; and he was altogether ignorant of the fact, that Mr. Ball advanced the moneys from the trust funds. These advances being made by Mr. Ball without the authority or privity of the trustees, amount only to a private loan from Mr. Ball to Lord Bective, and can in no manner affect the interests of Mr. Storie.

It is said that Mr. Storie, having instituted this suit for the benefit of himself and all other the debenture holders, was not at liberty, upon general principles, to dismiss his bill from motives of advantage to himself. I know of no such general principle. A plaintiff who sues on behalf of himself and all other persons of the same class, as he acts upon his own mere motion and at his own

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expense, retains the absolute dominion of the suit until the decree, and may dismiss the bill at his pleasure. After a decree he cannot, by his conduct, deprive other persons of the same class of the benefit of the decree, if they think fit to prosecute it. The reason of the distinction is, that before decree no other person of the class is bound to rely upon the diligence of him who has first instituted his suit, but may file a bill of his own; and that, after a decree, no second suit is permitted.

Bill dismissed with costs.[1]

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[\*199]

1895, 26th Jan. and 2d Feb.—*Legacy.—Purchaser.*

Legacy charged upon real estate, to vest immediately on the testator's death, but to be paid to the legatee on attaining twenty-one, and the interest to be applied in the mean time for maintenance, the legatee having died before attaining twenty-one; *Held*, that the express direction that the legacy should vest on the death of the testator, prevents its sinking for the benefit of the devisee, and that the personal representative of the legatee was entitled to the legacy.

Where real estate is devised, subject to debts and legacies, and the devisee is also executor, a purchaser or mortgagee from him of the real estate is liable to the charge, if the circumstances of the transaction afford intrinsic evidence that the mortgage or purchase money was not to be applied for the debts or legacies.

RICHARD WALKER, by his will, bequeathed to his two daughters, Jane and Sophia Walker, 1,000*l.* a piece, the same to vest in them immediately upon his death, but to be paid on their attaining their ages of twenty-one years, and the interest thereof, in the mean time, to be applied by his executrix in their maintenance and education; and he charged his real estate with the payment of those legacies: and, subject to the payment of his debts and funeral and testamentary expenses, which he desired might be paid by his executrix immediately after his decease, he gave all his real and personal estate to his wife for ever, and appointed her sole executrix of his will.

The testator died, leaving his wife and the two daughters named in his will, who were infants of tender age, him surviving.

The widow proved the will; and the personal estate being insufficient for the payment of the testator's debts, she supplied the deficiency out of the rents and profits of the real estate. The widow afterwards married J. Watkins; and, by a settlement made previous to their marriage, the real estate of her first husband was conveyed to such uses as the widow should appoint by deed or will; and, for want of such appointment, to \*the separate use of the widow for her life, with remainder to her [\*200] two daughters, Jane and Sophia Walker, in fee.

There were issue of this marriage two daughters, Margaret Watkins, who

[1] *Vide Burney v. Morgan*, 1 Sim. & Stu. 358; *Murphy v. Archdall*, Saunde & Scully, 633.

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was born on the 19th of June 1802, and Jane Watkins, who was born on the 27th of July 1804.

The daughters of the first marriage both died infants, intestate and unmarried; the elder having died on the 23d of October 1803, and the younger on the 21st of January 1819.

J. Watkins, the second husband, died in the year 1810. In June 1814 the widow intermarried with Solomon Cheek; and, by a settlement made previous to that marriage, the real estate of the testator, Richard Walker, was again settled to such uses as the widow should appoint by deed or will, and, for want of such appointment, to the separate use of the widow for life, with divers remainders over.

In October 1816, Solomon Cheek and his wife mortgaged this estate to Henry Burgess for 4,000*l*. The mortgage deed recited that Solomon Cheek, having occasion for the loan of 4,000*l*. he and his wife had requested Burgess to advance the same to him, upon the security of the estate; and the 4,000*l*. was in the deed stated to have been advanced to him, at the request of his wife; and he alone signed the receipt for the 4,000*l*. indorsed on the deed. The right of redemption was reserved to Mr. and Mrs. Cheek and the heirs, executors and administrators of the latter.

[\*201] \*By indenture, bearing date on the 29th of September 1818, Mrs.

Cheek appointed the estate, subject to the mortgage, to such uses as her husband should, by deed, appoint, with divers remainders over in default of appointment, with the ultimate remainder to her husband in fee. He afterwards borrowed from Burgess a further sum of 2,000*l*.; and, by an indenture bearing date the 23d of March 1819, directed and appointed the estate, by virtue of the deed of the 29th of September 1818, to be a security, not only for the 4,000*l*. before advanced, but also for the 2,000*l*. then advanced to him.

By an indenture, bearing date the 2d of June 1820, Cheek directed and appointed that the estate should remain and be upon trust for such persons, and for such estates and purposes, as his wife should, by deed, appoint, with divers remainders over in default of her appointment.

By other indentures, bearing date the 26th and 27th of September 1820, Mr. and Mrs. Cheek joined in conveying the estate to trustees, upon trust to sell, and to invest the produce of the sale upon real or government security, and to apply the same as Mrs. Cheek should appoint; with divers limitations over in default of appointment.

On the 27th of July 1821 the trustees for sale entered into an agreement with Burgess to sell the estate to him for 7,350*l*. deducting thereout the principal and interest due to him in respect of his two mortgages for 4,000*l*. and 2,000*l*.

[\*202] In order to complete this purchase, one Bousfield, at \*the request of Burgess, obtained letters of administration to Jane and Sophia Walker. But notice was given to Bousfield, on the part of Margaret and Jane Watkins, the two daughters of Mrs. Cheek by her second husband, that they claim-

ed, as the next of kin of Jane and Sophia Walker, an interest in the two sums of 1,000*l.* given to them by the will of their father, as charges upon the estate. Bousfield therefore declined to join in the conveyance to Burgess; and his purchase was not completed.

Mrs. Cheek had no child by her third husband.

The present bill was filed by Margaret and Jane Watkins, claiming to be entitled, with their mother, to the two sums of 1,000*l.* given to Jane and Sophia Walker; and praying that their shares of these two sums might be raised, with interest, by sale or mortgage of a sufficient part of the estate, and be laid out or invested for their benefit. The defendants were Burgess, Mr. and Mrs. Cheek, the trustees for sale under the indentures of the 26th and 27th of September 1820, and Bousfield, as the administrator of Jane and Sophia Walker.

It was admitted that, after satisfying the principal and interest due on the two mortgages for 4,000*l.* and 2,000*l.* the estate would not be sufficient to pay the shares of the two sums of 1,000*l.* which were claimed by the two plaintiffs.

Cheek and his wife did not resist the claim of the plaintiffs.

Mr. Sugden, and Mr. Treslove, for the defendant Burgess:—

I. The legacies to Jane and Sophia Walker are made \*payable at [\*203] twenty-one; and, as they died before attaining that age, their legacies sink for the benefit of the land. The general rule as to legacies charged upon land is, that the time of vesting is the time of payment, and that, if the legatee dies before the time of payment, his personal representatives are not entitled. The mere circumstance of directing maintenance does not vest a legacy. It is true that there are words in the will which say that the legacies are to vest on the death of the testator, and effect must be given to those words. But, as these legacies are given to females, the testator may have used those words with reference to the event of their marrying and dying under twenty-one, leaving issue. Upon examining the cases as to legacies charged upon land, this construction will not seem too much forced. The first case in which it was held that the circumstance of the legacy being charged on land should prevent the court from considering it as a vested legacy, although, according to all rules, it must have been considered vested if not charged upon land, was *Poulet v. Poulet*.<sup>(a)</sup> That was a case of extreme hardship; yet the court held that, being a charge upon land, it could not be considered vested where the legatee died before the time fixed in the will for the payment. *Earl of Rivers v. Earl of Derby*; <sup>(b)</sup> *Wilson v. Spencer*; <sup>(c)</sup> *Hodgson v. Rawson*; <sup>(d)</sup> *Lowther v. Condon*; <sup>(e)</sup> *Manning v. Herbert*.<sup>(f)</sup>

II. The real estate, being charged with the debts of the testator Richard Walker, Burgess, as mortgagee or purchaser, is not bound to take notice of the legacies.

(a) 1 Vern. 304, 321.

(d) 1 Ves. 44.

(b) 2 Vern. 72.

(e) 2 Atk. 127.

(c) 3 P. W. 172.

(f) Amb. 575.

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[\*204] \*Mr. Agar, and Mr. *Duckworth*, for the plaintiffs :—There are here express words that the legacies should vest on the testator's death. The court is bound by those expressions. The cases cited have no application ; as they are cases where the payment was postponed on account of the situation of the fund. *Duke of Chandos v. Talbot* ; (g) *Jennings v. Looks*. (h)

Mr. *Sugden* in reply. Here there is a direction that the legacy shall be vested at one time, and paid at another. The time of payment is what the court must look to, when the question is whether the legacy is to be raised or not. *Cowper v. Scot*. (i)

The VICE CHANCELLOR :—The first point made is, that the two legatees, Jane and Sophia Walker, having died before their ages of twenty-one, when the legacies are made payable, the legacies, as against the real estate, must sink for the benefit of the devisee. And this would certainly be the case, unless the testator, by his direction that the legacies shall vest in his daughters immediately upon his death, be considered to have expressed a different intention.

I have doubted much upon this question ; but, upon the whole, I believe the safest construction is, that the testator did, by the direction in question, mean to express that the legacies should not sink for the benefit of the devisee of the land if the daughters should die under twenty-one. As applied to the personal estate, this direction is wholly inoperative. Without this direction, the legacies, from the form of the gift, \*would have been payable out of the personal estate if the legatees had died under twenty-one. And, as applied to the real estate, the direction does not seem capable of any other meaning than that the legacies shall not fail by the death of the legatees before the time of payment.[1]

The next point made is, that this real estate, being primarily charged with the debts of the testator, the mortgagee was not bound to look to the satisfaction of the legacies. As a general principle, this proposition cannot be questioned. So a mortgagee or purchaser, from the executor, of a part of the personal property of the testator, has a right to infer that the executor is, in the mortgage or sale, acting fairly in the execution of his duty, and is not bound to inquire as to the debts or legacies. But if the nature of the transaction affords intrinsic evidence that the executor, in the mortgage or sale, is not acting in the execution of his duty, but is committing a breach of trust, as where the consideration of the mortgage or sale is a personal debt due from the executor to the mortgagee or purchaser, there such mortgagee or purchaser, being a party to the breach of trust, does not hold the property discharged from the trusts, but equally subject to the payment of debts and legacies as it would have been in the hands of the executor.

(g) 2 P. W. 612.

(h) 2 P. W. 276.

(i) 3 P. W. 119.

[1] Vide *Murkin v. Philpot*, 3 Mylne & Keene, 257. *Farmer v. Francis*, post 505, 508, and note *ibid*.

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The same principle is applicable to real estate; and the question is, whether the transactions in question did not afford intrinsic evidence that the mortgages to the defendant were not made by Cheek and wife, in order to pay the charges created on the estate by the will of the testator Walker, but for other purposes which amounted to a breach of trust. In the mortgage deed for 4,000*l.* it is expressly stated that the money is raised because [\*206] Solomon Cheek, the husband, had occasion for it; and he alone signs the receipt for the consideration. The mortgagee had therefore notice, from the intrinsic evidence of the transaction, that this sum was not to be applied in satisfaction of the charges under the testator's will.

Before the lending of the second sum of 2,000*l.* Solomon Cheek had, by the appointment of his wife, acquired the legal fee of the estate, subject to the first mortgage; and the second sum of 2,000*l.* is a mere personal loan to him, having no color of connection with the charges on the testator's estate. I am of opinion, therefore, that the defendant, the mortgagee, was a party to the breach of trust committed by these mortgages, and that the plaintiffs are entitled to a decree according to the prayer of the bill.[1]

[1] The testator devised his estate subject to debts and legacies; the devisee mortgaged the estate to A. subject expressly to the legacies. A. having called in his money, and the devisee requiring a further advance, they join in mortgaging the estate to B., but not expressly subject to the legacies; and B. is informed falsely by the devisee, that all the legacies had been paid; it was held that B. took the estate subject to the legacies; "for, on the face of his conveyance, it appears that he took the same estate that A. had." *Rogers v. Rogers*, 6 Sim. 364. But where an estate is charged generally with the payment of debts and legacies, and the debts have been paid but not the legacies, the purchaser will not be bound to see to the application of the purchase money, unless it be proved that he knew of the payment of the debts; and the taking of a general bond of indemnity, or of a bond of indemnity against the legacies only, will not raise the inference that he knew of such payment. "The general rule," says Lord Lyndhurst, "as to which there is no dispute is this: where legacies alone are charged, the purchasers of the real estate are bound to see to the application of the purchase money. Where debts are charged generally, or where debts and legacies are charged generally, the purchasers of the real estate are not bound to see to the application of the purchase money." *Johnson v. Kennett*, 3 Mylne & Keene, 624, overruling S. C. 6 Sim. 364. A testamentary charge of real estates with the payment of debts generally, authorizes a trustee, to whom after imposing the charge, the testator has devised the estates upon trust for other purposes, to sell or mortgage the estates charged, and exempts the purchaser or mortgagee from liability to see to the application of the purchase or mortgage money. *Ball v. Harris*, 4 Myl. & Cr. 264, affirming S. C. 8 Sim. 485. See further, *Shaw v. Borrer*, 1 Keen, 266. *Eland v. Eland*, 4 Myl. & Cr. 420. A lessee taking a reversionary lease from an executor, with full notice, is bound to show that such lease was properly granted by the executor in the due administration of his office; and a lessee taking an unusual lease is bound to see that the consideration is fully stated on the face of the instrument. "Many circumstances," says Ld. Ch. Sugden, "would justify an executor in equity in granting a lease instead of selling the premises, and I would sustain such a lease by an executor simply acting in a due administration of the assets, but such an act is not regularly in the province of an executor, and I must hold that it is incumbent on the persons taking a lease from executors to show, that the act was for the benefit of the persons beneficially interested in the property." *Keating v. Keating*, Lloyd & Gould, 133.

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## REYNOLDS v. JONES.

1825, 7th February.—*Tenant for life and remainder-men.—Trustee and cestui que trust.*

A trustee of a term for payment of debts purchased the inheritance from the tenant for life, and had it conveyed to him by fine and feoffment. The circumstance of the purchaser being trustee does not entitle the remainder-man to an account of rents, except from his entry to avoid the fine, nor, if he neglects to claim for five years, does it prevent his being barred.

AMY COOK, by her will, dated the 30th of September, 1768, devised her real estate to John Jones for a term of 500 years, in trust, out of the rents, or by sale or mortgage, to raise such sums of money as should be sufficient to pay all the debts which, at her decease, should be owing from her, or her late husband, or her late son; and, after the determination of that term, [\*207] to her daughter, Ann Watkins, for her life, with \*remainder to all the children of Ann Watkins, in such shares and proportions as she should by deed appoint, and, for want of such appointment, to all such children, in equal shares, as tenants in common in fee, with an executory devise over, in case there should be no such child living at the death of Ann Watkins.

Ann Watkins, upon her mother's decease, entered into possession of the estates, and afterwards married Bryan Reynolds, and had issue by him five children, all sons, the eldest of whom, W. Cook Reynolds, was born in 1772; and the fourth, the plaintiff, Thomas Reynolds, in 1778. The second son attained his age of twenty-one years, and died, unmarried and intestate, in the lifetime of his mother. The two other sons also died in the lifetime of their mother, infants and unmarried. The mother died in the year 1801: W. Cook Reynolds was at that time resident in Jamaica, and continued there until the year 1815, when he died intestate and without issue. In or about Easter term 1783, Mr. and Mrs. Reynolds levied a fine *sur conuzance de droit come ceo*, &c., with proclamations, of the estate so devised by the will of Amy Cook; and, by indenture of assignment, bearing date the 5th of April 1784, and made between Jones of the first part, Mr. and Mrs. Reynolds of the second part, and Edmund Chapp of the third part, reciting that the debts due from the testatrix, Amy Cook, her late husband and her late son amounted to the full sum of 1,970*l.* at the time of her decease, and consisted of the particulars therein mentioned, and, amongst the rest, of the sum of 100*l.* due on bond to John Jones; and also reciting that Mr. and Mrs. Reynolds, in pursuance of the will [\*208] of Amy Cook, had lately sold other parts of her devised \*estates for the sum of 380*l.* and had applied the same in discharge of the debts due from the testatrix, her husband, and her son; and further reciting that Bryan Reynolds, and Ann his wife had agreed to sell other parts of the devised estate, called Fox Leaze, and twenty acres of arable land, to John Jones, for a sum of 217*l.* 18*s.* to be applied towards payment of the debts of the testatrix, her husband, and son, and that it had been agreed that the term of five hundred years, as to the premises agreed to be sold, should be assigned by

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Jones to E. Chapp, in trust for Jones and his heirs; it was witnessed that, for the considerations aforesaid, and in consideration of the 217*l.* 18*s.* paid by Jones to Reynolds and his wife, the term of five hundred years, as to the lands called Fox Leaze, and twenty acres, was assigned to Chapp for the remainder of the term, in trust for Jones, his heirs and assigns, and to attend the inheritance. And, by indenture of feoffment, bearing date the 6th of April 1784, made between Mr. and Mrs. Reynolds of the one part, and John Jones of the other part, the land called Fox Leaze, and the twenty acres, were conveyed to John Jones and his heirs; and it was declared, that the fine should enure to the use of Jones, his heirs and assigns.

Upon the execution of these indentures, Jones entered into the possession of the premises therein comprised, and continued in the possession thereof until his death, in 1801. He was succeeded in the possession by the defendant Thomas Jones, his son, heir at law, and executor. On the 10th of July 1817, the plaintiff, Thomas Reynolds, made a formal entry upon the premises; and, on the 20th of September following, filed the present bill, claiming to be entitled, in his own right, to one fifth of the premises, and, as heir at law to \*his eldest brother, W. Cook Reynolds, to the other four fifths; [\*209] and praying to have an account taken of the rents of the premises from the death of his mother, and to have the possession delivered and assigned to him.

Mr. *Sugden*, and Mr. *Wilbraham*, for the plaintiff, contended that John Jones, being a trustee of the term, the whole transaction was, on his part, a breach of trust; that the plaintiff was, for that reason, entitled to carry back the account of rents to the death of his mother; and that, for the same reason, he was, as to the one fifth which he claimed in his own right, not barred by the fine, notwithstanding his entry to avoid it was not made within five years after his mother's death.

Mr. *Loat*, for the defendant, insisted, that the plaintiff could not, at law, recover the mesne profits, except from the time of his entry; and cited *Doe v. Hicks*,<sup>(a)</sup> *Compere v. Hicks*,<sup>(b)</sup> and *Hughes v. Thomas*.<sup>(c)</sup> He said that equity must in this respect follow the law, and that a court of equity would no more give the plaintiff the mesne profits from the death of the tenant for life, than a court of law could; that this point was adverted to by Lord Hardwicke, C. in *Norton v. Frecker*; <sup>(d)</sup> that the plaintiff must try his right at law, before he could come into equity for the rents and profits; that the term was no impediment to his bringing an ejectment, because he might have got it set aside by filing a bill for that purpose; that the plaintiff was not entitled to relief on the ground of Jones being a trustee; for, though he was \*trustee of the term, he was not trustee of the inheritance; that, if the [\*210] purchase-money had been applied in payment of the debts, the defendant ought to have the benefit of the term; and, upon the whole, he sub-

(a) 7 T. R. 433.

(b) *Ibid.* 727.

(c) 13 East, 474.

(d) 1 Atk. 524.



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mitted that the court could not order the estate to be delivered up, and that the plaintiff was not entitled to recover the rents at all; but if he was, that upon the authority of what was said by Lord Hardwicke, in *Norton v. Frecker*, he could recover them only from the time of ejectment brought, or bill filed, or at the utmost from the time of entry.

Mr. *Sugden*, in reply, admitted that in a common case the account must be the same in equity as it was at law; but he said that it frequently happened that, where a bill was filed to prevent the setting up of outstanding terms, the year elapsed before the plaintiff could try his title; that in such a case the filing of the bill was equivalent to bringing the action, and the suit stopped the time from running: that therefore relation must be had to the filing of the bill; that, in this case, the possession of Jones, during the life of the tenant for life, went for nothing, for the plaintiff was not bound to take advantage of the forfeiture; that the right of the eldest son was saved until he died, which was in 1815; that Jones, the purchaser, was a trustee of the fee; for, after the debts were paid, he was a trustee for the claimants of the inheritance, and that therefore it was impossible for him to bar the plaintiff's right; that the case of *Norton v. Frecker* was decided upon a legal title; but that in the present case there was no remedy for the plaintiff at law, because the legal interest was in the defendant; and that the defendant had no claim in respect of the [\*211] purchase money having been applied in payment of the debts, \*for there was no evidence of its having been so applied but, on the contrary, the assignment and feoffment mentioned that it was paid to Mr. and Mrs. Jones, who were not the trustees for payment of the debts.

The VICE-CHANCELLOR:—The elder brother, W. Cook Reynolds, being abroad at the death of his mother in 1801, and continuing abroad till his death in 1815, the entry of the plaintiff, his brother, upon the premises in 1817, was sufficient to protect from the operation of the fine the four fifths of the estate to which the elder brother was entitled at the death of his mother, and to which the plaintiff succeeded as his heir at law. Upon this entry, if there had been no outstanding term, the plaintiff could only have proceeded at law; but, in respect of the outstanding term, he was entitled to be relieved in equity. Unless the circumstance that John Jones, the father of the defendant, was himself the original trustee of this term, makes a difference in the case, it is plain that his relief in equity must be the same as it would have been at law; and that, as at law he could have recovered the mesne profits only from the time of his entry, so in equity his account of rents and profits must be limited to the same period. I am of opinion that the circumstance that John Jones, the purchaser, was himself the original trustee of the term, does in this respect make no difference. John Jones was no party to the disseisin created by the fine: and his trust term was not, nor could be made ancillary to that disseisin; and his acceptance of the tortious fee operated no prejudice to his *cestui que trusts*. To them it was perfectly indifferent whether the tortious fee passed to John Jones, or to a stranger, or remained in the father or

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mother. The plaintiff, therefore, as to \*the four fifth parts of which [\*212] his elder brother was seised at the death of his mother, is entitled to an account of the rents and profits from July 1817, when the entry was made, and to a delivery of the possession, and an assignment of the term, as to such four fifth parts; subject, however, to a consideration of the equity which is claimed in the answer.

In the assignment of the trust term, made by John Jones the trustee, upon his purchase of the wrongful fee, to which assignment the father and mother of the plaintiff are parties, it is recited that the sale was made in the substantial execution of the trusts of the will of the testatrix, and for the purpose of paying the debts charged upon the estate, and the defendant therefore claims to stand in the place of the creditors, to the extent of the purchase money actually applied in payment of the debts. If, as the answer suggests, the whole of the estate was not equal to the payment of the debts, and this contrivance for the sale of the fee was only resorted to for the purpose of raising a larger sum in satisfaction of the debts than could be raised by sale of the term, there can be no complaint of the motives of the parties, however irregular their conduct may have been. I am of opinion, therefore, that the defendant is entitled to an inquiry whether the purchase money of 218*l.* 17*s.*, or any and what part thereof, was applied in payment of debts of the testatrix, her husband, and her son, which would have been properly raised by sale or mortgage of the term of five hundred years: and, in case the master shall find that the said sum, or any part thereof, was so applied, then that the defendant is entitled, as against the plaintiff suing for the four fifth parts as heir to his brother, to be repaid four fifths of the sum so applied, together with interest thereon from \*the time of the entry in July 1817, when [\*213] the plaintiff's title to the four-fifth parts of the rents and profits will begin.

The claim of the plaintiff as to one fifth part of the property, in his own right, under the limitations of the testatrix's will, suggests greater difficulties. The title of the plaintiff, as to the one fifth part of the fee of the estate, is wholly gone by the fine and nonclaim; and, speaking now without reference to the circumstance that John Jones the purchaser was the trustee of the term, I am of opinion that, where there is a term to attend the inheritance, and the right to the inheritance is lost by fine and nonclaim, equity must follow the law, and cannot consider him who has lost the inheritance as entitled, in equity, to claim the term which is to attend it; and, for the same reasons which I have already given, I think, in this respect, it makes no difference that John Jones was himself the trustee of the term. As to the one fifth, therefore, which the plaintiff claims in his own right, my opinion is, that he altogether fails.

Reserve the consideration of further directions and costs until after the master shall have made his report.

1825.—Thackeray v. Hampson.

[\*214]

\*THACKERAY v. HAMPSON.

1825, 8th, 10th, and 22d February.—*Legacy*.

Residuary bequest to two grand-daughters of testatrix, "in trust till they come of age or marry, the interest to be received in the meantime, and paid to them; but if one of them die before marriage or of age, then to the survivor or her child or children; but should they both die leaving no issue, then I give them power to leave it by will as they shall think fit." One of the legatees married, and the other attained twenty-one. *Held*, that they both acquired absolute vested interests.

ELIZABETH TATTERSALL made a will and two codicils: the second codicil was in her own handwriting, and contained the following bequest:—"I leave the residue and whatever else I may hereafter be entitled to, whatsoever and wheresoever, to my two dearest grand-daughters, Mary Ann Cottin and Elizabeth Margaretta Cottin, equally divided, including what I have already left them in my will and other codicil, in trust till they come of age or marry, which shall first happen, the interest to be received in the meantime and paid them; but if one of them die before marriage or of age, then to go to the survivor, or her child or children; but should they both die leaving no issue, I then give them the power to leave it, by will, as they shall think proper, being well assured they will do what is right."

Mary Ann Cottin married the plaintiff, Dr. Thackeray, and afterwards died, leaving an infant child, who was one of the defendants. Elizabeth Margaretta Cottin, the other plaintiff, long since attained the age of twenty-one.

The question was, what interest the grand-daughters had in the residue.

Mr. *Heald*, and Mr. *Lynch*, for the plaintiffs:—The grand-daughters [\*215] take absolute interests, liable to be divested in case of their dying under twenty-one or before marriage. Both of them having lived till one of them was married and the other attained twenty-one, their interests became absolute and indefeasible. The period of payment is twenty-one or marriage; and the words "in trust till they come of age or marry," suspend the time of payment only, and not that of vesting. The direction to pay them interest in the meantime, is sufficient to give them vested interests. In *Hanson v. Graham*,<sup>(a)</sup> it was held that a direction to pay interest in the meantime to the legatee, was sufficient to vest the legacy, even where the words of gift of the principal imported a contingency. In the passage, "but if one of them die before marriage or of age," the word *or* must be read *and*; because, if taken in the disjunctive and one of the grandchildren died under twenty-one leaving issue, the issue could not take. In *Eastman v. Baker*,<sup>(b)</sup> Lord Chief-Justice Mansfield, speaking of that case in which *or* was read *and*, says, "according to *Fairfield v. Morgan*,<sup>(c)</sup> and the other cases cited, it must mean *and*, because, if it does not, it follows that, upon the contingency of the daughter dying having issue, but not having attained the age of twenty-one years, the estate would

(a) 6 Ves. 239.

(b) 1 Taunt. 182.

(c) 2 New Rep. 38.

1825.—*Thackeray v. Hampson.*

pass over from her children; which could never be the testator's intention." The words, "should they both die leaving no issue," must be confined to their dying under twenty-one without issue. If so, the case is within *Right v. Day*; (d) for, if the expressions were not confined to dying under twenty-one without issue, the whole fund must have remained under the control of the trustees: but instead of that, the testatrix says "that, in such an event, [\*216] the grand-daughters are to have an absolute power to dispose of it as they please; and states also a time at which they are to have it paid. *Doo v. Brabant* (e) is a much stronger case than this, because the will there contained no direct gift to the children. The power to dispose by will is alone enough to give the grandchildren absolute interests. *Robinson v. Dugale*. (f)

Mr. Thomson for the infant defendant Thackeray :—In *Newman v. Nightingale*, (g) where the words of bequest were "to the sole use of Mrs. Elizabeth, or of her children for ever," it was held, that Mrs. Newman took only a life estate, and that her children took an absolute interest in remainder. The words used in this case would not give the grandchildren an interest amounting to an estate tail if the property were real estate. The dying without issue is not, upon the words used, confined to any particular age, but is general, extending to death without issue at whatever age.

Mr. Turner, and Mr. Bassett, for the other defendants, who were trustees.

22d February.—The VICE-CHANCELLOR :—It is impossible to reconcile the different expressions in this codicil, if they are to be literally understood. The testatrix first gives to the grand-daughters an absolute interest on their attaining twenty-one or marrying sooner; and, if either die before twenty-one and unmarried, then her plain intention is, that her "share [\*217] shall go to the other grand-daughter, if she be living; or, if she be dead, to any child or children she may have left.

It is not safe to defeat this plain expressed intention of the testatrix by a subsequent ambiguous passage. Both grand-daughters having lived either to marry or to attain twenty-one, both took absolute vested interests; and the testatrix must be intended, by the expression, "should they both die leaving no issue," to have meant a dying without issue before the shares became absolutely vested. [1]

(d) 16 East, 67.

(e) 4 T. R. 706.

(f) 2 Vern. 181.

(g) 1 Cox, 341.

[1] Vide *Farmer v. Francis*, post, 505.

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1825.—*Rothwell v. Rothwell*.

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**ROTHWELL v. ROTHWELL.**

21st February, *Practice*.—*Payment of money into court.*

A defendant, who had covenanted to pay a sum of money to the trustees of his marriage settlement, but had omitted to do so, ordered, upon motion in a suit for the performance of the trusts of the settlement, to pay the money into court.

Where the answer contains a clear admission, that there is trust money in the hands of a defendant, the court will always, on an interlocutory application, order it to be paid into court.

An executor admitting himself to be a debtor to the testator at his death, will be ordered on motion to pay the debt into court.

The defendant Rothwell covenanted, by his marriage settlement, to pay, within twelve months after the marriage, 850*l.* to the trustees of the settlement, upon certain trusts for the benefit of himself and his intended wife and the issue of the marriage. This sum not being paid at the appointed time, the children of the marriage filed a bill against their father and mother and the trustees, to have the trusts of the settlement performed, and the 850*l.* got in and invested upon the trusts of the settlement. Rothwell, in his answer, admitted the settlement, and also that the 850*l.* had not been got in, but that it was still in his hands.

[\*218] \*Mr. *Spence*, for the plaintiffs, now moved, that Rothwell might be ordered to pay the 850*l.* into court.

Mr. *Pemberton* opposed the motion, on the ground that the relief sought could be obtained by decree only.

The VICE-CHANCELLOR :—Where the answer contains a clear admission that there is trust money in the hands of a defendant, the court will make an interlocutory order for securing it in the name of the accountant-general; and the father's answer contains a clear admission that this sum of 850*l.* trust money is in his hands.[1] So where an executor admits himself to have been a debtor to the testator at the time of his death, this has always been held a clear admission of assets in his hands to the amount of the debt, and he is compelled to pay it into court accordingly.[2]

[1] Vide *Collis v. Collis*, 2 Sim. 385.

[2] This case has been affirmed. "There are cases in which the court has apparently ordered the payment of a debt upon motion; such as where an executor or trustee admits himself to owe a debt to an estate he represents. *Rothwell v. Rothwell*, carries it further; but that decision proceeded upon the particular form of the admission in the answer; and in those cases, the person to pay and the person to receive being the same, the court assumes that what ought to have been done, has been done, and orders the payment, not as of a debt by a debtor, but as of moneys realized in the hands of the executor or trustee." Lord Chancellor Cottenham in *Richardson v. Bank of England*, 4 Myln. & Cr. 174.

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1825.—*Haddock v. Thomson.*

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\**HADDOCK v. THOMLINSON.*

[\*219]

1825, 21st February.—*Pleading.*

It is not necessary to pray process against persons who are charged to be out of the jurisdiction of the court.

SOME of the parties interested in the subject of this suit were charged by the bill to be out of the jurisdiction of the court, but were not named in the prayer of process, and an objection was taken to the bill on that account.

Mr. *Hart*, in support of the objection.

Mr. *Martin*, contra.

The VICE-CHANCELLOR :—It is usual and convenient that such parties should be named in the prayer of process ;[1] because, if they come within the jurisdiction, process may issue against them without amending the bill. But the omission of their names in the prayer of process does not render the record defective.(a)

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JONES v. TOTTY.

1825, 21st February.—*Practice.—Writ of partition.*

Where a schedule, written on paper, was returned with a commission of partition, the plaintiff's clerk in court was allowed to engross it on parchment, and to file the engrossment with the return, in analogy to the practice where foreign depositions are returned on paper.

A COMMISSION of partition was returned with a paper schedule of the quantities and particulars of the lands attached to it, signed by the commissioners and referred to in their return.

\*Mr. *Smith*, for the plaintiffs, moved that their clerk in court might [\*220] now engross the schedule upon parchment, and that the engrossment might be filed with the writ and return.

Mr. *Daniell*, for the defendants, opposed the motion.

The VICE-CHANCELLOR :—It is not unusual for depositions taken abroad to be returned upon paper from places where parchment is not to be had ; and then the practice is, to apply to the Master of the Rolls, by petition, that the clerk in court may engross upon parchment the depositions so taken, and that the original depositions and engrossments may be filed together. This case is not altogether within that principle ; because here parchment might have been had, and the use of paper is a mere inadvertence on the part of the commissioners. In order, however, to avoid the expense and inconvenience of sending the proceedings back to the commissioners to correct their error, I will act upon analogy to the case which I have stated, and make the order as prayed.(b)

(a) Mitf. 134.

(b) See *Chitty v. East India Company*, 3 Cox, 190.

[1] Vide *Brooks v. Burt*, 1 Beav. 109. In *Munoz v. De Tastet*, *ibid.*, n. it was held that process must be prayed against the party out of the jurisdiction.

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 1825—*Lewis v. Marsh.*


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**LEWIS v. MARSH.**1825, 21st February.—*Practice.—Pro confesso.*

If there is only one defendant, the bill may be ordered to be taken, *pro confesso*, on motion.

THE defendant being brought up in custody, Mr. *Cooper*, for the plaintiff, now moved that the bill might be taken *pro confesso*, there being no other defendant; and he cited *Seagrave v. Edwards.*(a)

Motion granted.

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[\*221]

**\*HOUEAM v. SANDYS.**1825, 26th February.—*Practice.—Witness.*

Permission given to defendants, after decree, to examine a plaintiff as a witness, the master having certified the necessity for so doing, and the plaintiff having no beneficial interest in the property in dispute.

THE object of the suit was to obtain the opinion of the court as to the rights of the defendants to certain sums of which the plaintiffs were trustees. The decree directed certain inquiries to be made, and the parties to be examined on interrogatories, as the master should direct. The master certified that, for the better prosecuting the inquiries, it would be necessary to examine one of the plaintiffs as a witness in the cause.

Mr. *Spence*, for the defendants, now moved that that plaintiff might be examined as a witness, in pursuance of the certificate, and that the defendants might sue out a commission for that purpose. He said that the plaintiffs were merely trustees, and had no beneficial interest in the property in dispute.

Motion granted.

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**HODGSON v. DEAN.**21st February, and 7th March.—*Practice.—Affidavit.—Notice.*

It is not necessary for a plaintiff who claims an estate as tenant in tail under the marriage settlement of his father and mother, to prove their marriage by affidavit, before he shows cause against dissolving an injunction to restrain an ejectment brought against him to recover the estate.

Where it appears that an incumbrancer on an estate in Yorkshire searched the register from a certain date only, it will not be presumed that he had notice of any of the contents prior to that date.

NATHANIEL HODGSON, by his marriage settlement, dated in August 1755, conveyed an estate in the North Riding of Yorkshire, to the use of him-  
[\*222] self for life; with remainder to his intended wife for life; with \*re-

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1825 — Hodgson v. Dean.

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mainder to the first and other sons of the marriage in tail male ; with divers remainders over. At the date of the settlement the legal estate in fee was outstanding in a mortgagee ; but in 1759 Nathaniel Hodgson took a re-conveyance from the mortgagee to himself in fee. In 1794 Nathaniel Hodgson died, leaving Nathaniel Bryan Hodgson his eldest son, who, upon the death of his father, entered upon the estate, as tenant in tail under the settlement. In November 1815, Nathaniel Bryan Hodgson, representing himself to be seised in fee of the estate, mortgaged it to the defendant Dean for a term of one thousand years ; and, in the abstract of title delivered to the defendant upon that occasion, he suppressed his father's settlement, but stated the mortgage in 1728, the re-conveyance to his father after the settlement, and represented himself as taking by descent from his father. The first mortgage was not registered, because, the register act for the North Riding of Yorkshire was not passed till after it was executed ; but the settlement and the defendant's mortgage deed were duly registered. On the treaty for the mortgage, the defendant's solicitor wrote to the deputy registrar of the Riding, requesting that he would search the register as to the estate in question up to the year 1794, when Nathaniel Hodgson died ; and was informed, in answer, that the search had been made up to the year 1794, but that nothing had been found relating to the estate, except a deed executed by Nathaniel Bryan Hodgson in 1801, which had no bearing upon the present question.

Upon the death of Nathaniel Bryan Hodgson, without having suffered a recovery of the estate, the present plaintiff, his eldest son, entered upon it as issue in \*tail ; and the defendant having brought an eject- [\*223] ment to recover possession under his mortgage deed, the present bill was filed to restrain that action, on the ground that the defendant had notice of the settlement, in consequence of the search made in the register. The defendant, in his answer, insisted upon his title as mortgagee of the legal estate without notice of the settlement ; and stated that he did not know nor could set forth whether any such settlement was made by Nathaniel Hodgson, nor whether the plaintiff was or not entitled to any estate under that settlement. The injunction having been obtained, a motion was made to dissolve it. The plaintiff, preparatory to showing cause against that motion, filed an affidavit to prove the execution of the settlement, and that no act had been done to bar the estate tail created by it ; but he omitted to prove the marriage of his father and mother.

Mr. Hart, and Mr. Barber, on showing cause against dissolving the information, said that where the answer of the defendant did not admit the plaintiff's right, it was necessary that the plaintiffs should support it by affidavit, and that he had attempted to do so here, but had failed.

The Vice-Chancellor said that, where an instrument was neither admitted nor denied in the answer, it was necessary for the plaintiff to prove the existence of it by affidavit ; but that he thought the rule and practice were otherwise as to the personal title of the plaintiff ; and that he supposed that the



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 1825.—*Hamilton v. Hibbert.*


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reason for the distinction was, that the plaintiff being, from the nature [\*224] of the proceedings, necessarily in the actual possession \*of the land in question, either by himself or his tenant, such possession was considered as sufficient evidence of his alleged title for the purpose of the injunction where, though not admitted, it was not denied by the answer; and he stated that, where the answer denied the title of the plaintiff, there no affidavit could be filed by the plaintiff in opposition to the answer, and he referred to the case of *Norway v. Rows*.(a)

But he added that this point was not material; because, if the affidavit filed by the plaintiff had, as the defendant's counsel alleged, omitted to state the fact of the marriage of the plaintiff's father and mother, he would permit the plaintiff to cure the omission by a farther affidavit.

Mr. *Hart*, and Mr. *Barber*, then contended that, although it was not necessary for the defendant to search the register when he took the mortgage, yet, having actually caused a search to be made, he must be considered as having constructive notice of all the contents of the register, and consequently of the settlement in 1755, which was duly registered; and they referred to Lord Redesdale's opinion in *Bushell v. Bushell*.(b)

Mr. *Sugden*, and Mr. *Rose*, appeared for the defendant.

The VICE CHANCELLOR:—The defendant, not being bound to search the register, cannot be affected by constructive notice of the registered settlement.

It must be established against him, that he had actual notice of that [\*225] settlement. It \*is plain, in this case, that he had not actual notice, since the search made on his part did not reach higher than 1794, and the settlement was made in 1755.

Where a search is generally admitted or proved, there it may be a proper rule of evidence or presumption that the party searching was acquainted with all the contents of the register; but the particular facts in this case exclude that presumption.[1]

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### HAMILTON V. HIBBERT.

1825, 26th February.—*Practice.*

A plea may be filed after the return of a simple attachment.

AN attachment had issued against the defendant for want of an answer, and the sheriff had returned *cepi corpus*. The defendant then filed a plea to the whole bill.

Mr. *J. Wilson*, for the plaintiff, moved that the plea might be taken off the

(a) 19 Ves. 144.

(b) 1 Scho. & Lef. 103.

[1] This case has been affirmed.

1825.—Wynne v. Jackson.

file for irregularity, on the ground that the defendant, being in contempt, could only answer the bill.

Mr. *Spence* appeared for the defendant.

The Vice-Chancellor refused the motion, with costs; saying that a defendant might plead after the return of a simple attachment, but not of an attachment with proclamations, and referred to *Sanders v. Murney*.(a)

\*WYNNE v. JACKSON.

[\*226]

1825, 26th February, and 5th March.—*Practice*.—*Injunction*.

A defendant may file a further answer before the master has signed his report as to the insufficiency of the first answer.

An order for an injunction for want of an answer obtained after the master has signed his report of the insufficiency of the answer, but before the report is filed, is irregular.

THE plaintiff had taken exceptions to the answer, and some of them were allowed by the master; but, before the report was made, the defendant put in a further answer. The master then signed his report, and it was filed on the day after. On the day on which the report was signed, the plaintiff obtained an order for an injunction for want of an answer.

Mr. *Spence*, for the defendant, now moved to discharge that order, for irregularity, contending that the plaintiff could not proceed upon the master's report, until it was filed; as such a proceeding would be in a direct violation of the order of the 29th of October 1792;(b) and he cited *Knox v. Symmonds*,(c) and *Job v. Barker*.(d)

Mr. *Sugden*, contra.

Mr. *Walker*, the registrar, having, by the Vice-Chancellor's desire, inquired into the practice upon the subject, informed his honor that the defendant was regular in filing his further answer; and that the plaintiff was irregular in obtaining the order for the injunction, not only because the report was not filed when he obtained the injunction, but because the further answer was then filed.

Motion granted.

\*MALTBY v. RUSSELL.

[\*227]

1825, 9th and 21st March.—*Executor*.

An executor or administrator may, after a suit is instituted against him for an account, pay any simple contract or specialty creditor, and will be allowed such payment in passing his accounts.

THIS was a creditors' suit. The decree directed the master to take the usual accounts.

(a) Ante, vol. 1, 225. [The costs of the attachment must first be paid or tendered. *Foulkes v. Jones*, 2 Beav. 274.]

(b) Beam. Ord. 292.

(c) 1 Ves. jun. 87.

(d) 2 Swan. 255.

1825.—*Malby v. Russell.*

The personal representatives had, subsequently to the filing of the bill, paid several of the testator's debts, one of which was due to a firm in which one of them was a partner. The master having refused to allow them the sums they had paid in discharge of those debts, they took exceptions to his report.

These exceptions now came on to be argued.

Mr. *Sugden*, Mr. *Simpkinson*, and Mr. *Griddlestone, jun.* in support of the exceptions, insisted on the authority of *Lord Orford v. Darston*,<sup>(a)</sup> in which the house of lords reversed the decree of Lord Keeper Wright,<sup>(b)</sup> as having settled that such payments ought to be allowed to the executor; and they also cited *Perry v. Phelps*,<sup>(c)</sup> *Robinson v. Tonge*,<sup>(d)</sup> and *Waring v. Danvers*.<sup>(e)</sup>

Mr. *Rose*, and Mr. *Pemberton*, for the devisees of the real estate.

Mr. *Horne*, and Mr. *Lovatt*, for the plaintiffs, contended that, after a bill for an account was filed against the personal representatives, they had [\*228] no right to prefer any creditor: and cited *Bright v. Woodward*,<sup>(f)</sup> and *Dee*.<sup>(g)</sup>

The Vice-Chancellor on the argument, expressed a strong opinion in favor of the master's report, and doubted the correctness of Colles' report of the case of *Lord Orford v. Darston*. His honor, however, took time to consider of the case, and afterwards delivered judgment to the following effect.

The VICE-CHANCELLOR:—That an executor should be permitted, after a bill filed for the administration of the assets here, to prefer one creditor to another, breaks in upon the ruling principle, that equality is equity. Even at law, an executor cannot, after an action brought, prefer one creditor to another, unless judgment is first obtained against him; which is founded upon the principle of greater legal diligence. He is indeed permitted to confess such judgment, (which breaks in upon the principle of greater legal diligence,) because it is said that he is not bound to charge his testator's estate with costs, by defending the action where he knows the debt to be due.

I find, however, that the case of *Darston v. Lord Orford*, in the house of lords, is correctly reported; and in *Waring v. Danvers*,<sup>(h)</sup> it is expressly referred to as establishing the point that an executor may give a preference after a suit instituted.

I am bound therefore by this authority to allow the exceptions in this case.[1]

(a) Colles, P. C. 229.

(b) Pre. Cha. 188.

(c) 10 Ves. 34.

(d) 3 P. W. 398.

(e) 1 P. W. 295.

(f) 1 Vern. 369.

(g) 2 Cha. Ca. 200.

(h) 1 P. W. 295.

[1] Vide *Layfield v. Layfield*, 7 Sim. 172.

1825.—Strutt v. Finch.

\*STRUTT v. FINCH.

[\*229]

1825, 8th March.—*Will.—Copyholds.*

Testator having surrendered some of his copyholds to the use of his will, and left others unsundered, devised all his copyhold messuages, lands, &c. whatsoever and wheresoever, and which he had surrendered to the use of his will: held that the unsundered as well as the surrendered estates passed by the will.

WILLIAM WALTHAM devised as follows:—"I give and devise all and every my freehold messuages, lands, tenements and hereditaments, whatsoever and wheresoever, with their and every of their appurtenances, unto and to the use of Joseph Stonard, Holden Strutt and Thomas Gardiner Bramston, esquires, their heirs and assigns, for ever, but upon trust that they the said Joseph Stonard, Holden Strutt and Thomas Gardiner Bramston, and the survivors and survivor of them, and the heirs and assigns of such survivor, shall and do, and I do hereby direct and appoint, authorize and empower them the said Joseph Stonard, Holden Strutt and Thomas Gardiner Bramston, and the survivors and survivor of them, and the heirs and assigns of such survivor, absolutely to sell by auction and dispose of, not only all my said freehold messuages, lands, tenements and hereditaments hereby devised to them as aforesaid, but also all and every my copyhold or customary messuages, lands, tenements, hereditaments and premises, whatsoever and wheresoever, with their appurtenances, (and which I have surrendered to the use of this my will,) and every part and parts thereof respectively, either together or in parcels, and either by public auction or private contract, unto any person or persons whomsoever who shall be willing to become the purchaser or purchasers thereof, for the best price or prices in money that can or may be reasonably had \*or obtained for the same respectively, and to convey and [\*230] assure, or cause to be conveyed and assured, all and every my said freehold messuages, lands, tenements and hereditaments, with the appurtenances, unto the purchaser or respective purchasers thereof, as he, she or they shall direct or appoint, and also to cause and procure the purchaser or respective purchasers of my said copyhold messuages, lands, tenements, hereditaments and premises to be admitted thereto under or by virtue of this my will or the surrender to the use thereof as aforesaid."

The testator then directed his trustee to invest the money produced by the sale in government or real securities, and, out of the dividends and interest thereof, to pay annuities to his widow and daughters, and to his son William Waltham, and, subject thereto, to assign and transfer the securities amongst the children of his daughters: and he declared it to be his express desire that, in case his son William Waltham should in any way attempt to disturb his will by making any claim upon any part of his estate, after such claim, his trustees should immediately stop payment of his annuity.

The testator died in January 1811. He was, at the date of his will and at

1825.—*Strutt v. Finch.*

his death, seised of certain freehold estates, and of two copyhold estates, one holden of the manor of Muckinghall in Essex, and the other of the manor of South Church in the same county ; but he had surrendered the former of them only to the use of his will.

William Waltham, the son and customary heir of the testator, by [\*231] his will dated the 16th of October, 1811, \*gave the unsurrendered estate to his wife Elizabeth Waltham, and died shortly afterwards. The question was whether the unsurrendered, as well as the surrendered copyholds, passed by the will of William Waltham, the father.

Mr. Sugden, and Mr. Roupell, for the defendant Elizabeth Waltham :—The devise is limited to the copyholds which William Waltham, the father, had surrendered to the use of his will. The words, “and which I have surrendered to the use of this will,” are part of the description of the property devised. He has put these words into a parenthesis, because he has coupled the copyhold with the freehold. The rule laid down in *Roe v. Vernon*(a) is that, where there is sufficient certainty before by way of description of the thing granted, as by giving to a close a particular name, &c. there a subsequent mistake, as the tenant’s name, the number of acres or the rent, shall not hurt the grant. But, where the premises are first described generally, and afterwards a particular description is added, that shall restrain the general words. Here, as it is a general devise of all the testator’s copyhold messuages, lands, tenements and hereditaments, and not a devise of any particular messuage belonging to the testator, and, as words which amount to a restriction are added, the court is bound to consider them as restrictive. The conjunction “and” being used here cannot alter the sense of the expression used. The court must feel certain that no meaning was intended to be put upon the words, before the heir can be excluded. *Gascoigne v. Barker*,(b) [\*232] *Wilson v. Mount*,(c) *Judd v. Pratt*,(d) This last case was as strong a one for raising a case of election as the present, and yet the heir was not put to his election.

Mr. Hart, Mr. Agar, Mr. Heald, Mr. Preston, Mr. Garratt, and Mr. Miller, for the testator’s daughters, and other parties to the suit :—The word “and” does not occur in the cases which have been cited for the widow ; and the want of that word affords a real distinction between those cases and the present one. The cases of *Banks v. Denshaw*,(e) and *Rumbold v. Rumbold*,(f) are authorities in our favor. Besides, the testator has declared it to be his express desire that, if his son should attempt to disturb his will, the trustees should cease to pay him the annuity. It is quite clear that he meant to exclude him from making claim to any part of his estate ; and, therefore, to give all his copyhold estates, whether surrendered or not, to the trustees ; and there are persons here who are entitled to have the surrender supplied ; for the first trust is to pay annuities to the testator’s widow and children.

(a) 5 East, 51.

(b) 3 Atk. 8.

(c) 3 Ves. 191.

(d) 13 Ves. 168, and 15 Ves. 390.

(e) 3 Atk. 585 ; and 1 Ves. 63.

(f) 3 Ves. 65.

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 1825.—*Ovey v. Leighton*.
 

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Mr. *Sugden*, in reply:—The only difficulty arises from the word “and;” for the cases authorize the parenthesis to be put out of the question. The devise is the same as if the testator had said, “I give all my copyhold estates which I have surrendered to the use of my will. I do not give all my copyholds which are to be found any where, but those only which I have surrendered to the \*use of my will.” This construction gives a mean- [\*233] ing to every word that the testator has used. It is a material circumstance in this case, that the testator did know that it was necessary to surrender his copyholds to the use of his will. In *Rumbold v. Rumbold*, no part of the testator’s copyholds had been surrendered to the use of his will; and, therefore, it was quite clear that the court could come to no other decision than it did in that case. In *Banks v. Denshaw*, the facts are not stated in the report; they are only glanced at in the judgment; and Lord Hardwicke says that the subsequent part of the will put the matter out of all doubt as to the testator’s intention. The clause which directs the trustees to stop payment of the son’s annuity, does not mean that he is to be put to his election, but merely that he is to forfeit his annuity. There can be no doubt that the clause only means to restrict the son from claiming such parts of the estate as passed by the will. Here he does not claim an estate which passed by the will. It is clearly settled that the court will not supply a surrender in favor of grandchildren; and that, if it is called upon to supply it in favor of a widow or children, it will deny its aid to persons more remotely related to the testator.

The VICE-CHANCELLOR:—The question is, whether the expression, “and which I have surrendered to the use of my will,” used by the testator after a general gift of all his copyhold estate whatsoever and wheresoever, was intended by the testator as an exception to the generality of the gift, or as an affirmation of a fact with respect to the subject of the gift in which he appears to have been mistaken.

\*Every expression is to be understood according to its natural and [\*234] grammatical sense, unless a different intention appears from other parts of the instrument. The natural and grammatical sense of this expression is plainly affirmative, and not exceptive. The copulative “and” distinguishes this case from the case of *Wilson v. Mount*. The customary heir must elect.[1]

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#### OVEY v. LEIGHTON.

1825, 9th March.—*Answer*.—*Exceptions*.

A defendant cannot, by answer, protect himself from answering fully, on the ground of his being a purchaser for valuable consideration.

Where a plaintiff takes no exception to the answer to the original bill, he cannot take an exception to the answer to the amended bill, upon a principle which would have applied equally to the answer to the original bill.

[1] Vide *Oxenforth v. Cusackwell*, post, 558.

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 1825.—Hodgson v. Butterfield.
 

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THE original bill was filed for a discovery and partition. The defendant by his answer admitted that he had in his possession title deeds belonging to the estate in question, but stated that he was a purchaser for valuable consideration, and insisted that, for that reason, he was not bound to set forth a schedule of those deeds, as required by the bill.

The plaintiff did not take exceptions to the answer; but amended his bill, and charged many particulars as to the title to the estate and the deeds in the defendant's possession.

The defendant, by his answer to the amended bill, again insisted that he was a purchaser for valuable consideration, and, as such, not bound to set forth a schedule of the deeds.

The plaintiff excepted to this answer, on the ground that it neither contained a full answer as to the title, nor a schedule of the title-deeds as required by the bill. The master overruled the exceptions; upon which the plaintiff excepted to his report.

[\*235] \*Mr. Wakefield, in support of the exceptions, contended that, although a purchaser for valuable consideration might by plea protect himself from answering fully; yet that, if he submitted to answer, he must answer as to every particular interrogated to by the bill.

Mr. Hart, and Mr. Perkins, contra, insisted, first, that the defendant, being a purchaser for valuable consideration, was within the exception to the general rule, and might, by answer, protect himself from answering fully, and cited *Jerraud v. Saunders*; (a) and, secondly, that the plaintiff, not having excepted to the answer to the original bill, could not maintain exceptions to the answer to the amended bill, as to points which were applicable to the answer to the original bill.

The Vice-Chancellor held, first, that a purchaser for valuable consideration, submitting to answer, and not protecting himself by plea, must answer fully; [1] and, secondly, that the plaintiff having waived this exception to the answer to the original bill, could not recur to it on the answer to the amended bill. [2]

[\*236]

\*HODGSON V. BUTTERFIELD.

1825, 10th March.—*Exceptions.*

Exceptions to an answer containing in substance, but not *verbatim*, the interrogatories not answered, will be overruled. But if the defendant has submitted to answer, and his further answer is referred back, he is too late to object to the form of the exceptions.

THE plaintiff had excepted to the answer. The defendant submitted to the

(a) 2 Ves. jun. 454.

[1] Vide acc. *Earl of Portarlington v. Soulby*, 7 Sim. 28; see also, *Cuyler and others v. Bogart and others*, 3 Paige, 186; *Champlin v. Champlin*, 2 Edw. 362.

[2] Vide *The Bennington Iron Co. and others v. Campbell and others*, 2 Paige, 159.

1825.—Wilkinson v. Wilkinson.

exceptions, and put in a further answer. The plaintiff referred back the further answer upon the old exceptions; and the master reported it insufficient. The defendant then excepted to the report. The exceptions varied in expression, but contained, as the plaintiff alleged, the substance of the interrogatories which were not answered.

Mr. *Bligh*, for the defendant, objected to the exceptions, on account of their not containing the interrogatories *verbatim*.

Mr. *K. Parker*, contra.

The VICE CHANCELLOR:—If the plaintiff complains that a particular interrogatory of the bill is not answered, he must state the interrogatory in the very terms of it, and cannot impose upon the court the trouble of first determining whether the varied expressions of the interrogatory and the exception are to be wholly reconciled. But, as this defendant has submitted to answer these exceptions, he comes too late with the objection now made, and must answer fully.[1]

\*WILKINSON v. WILKINSON.

[\*237]

1825, 11th March.—*Trustees' allowances.*

Testator gave annuities to his trustees for their trouble in the execution of his will, and died possessed of several houses, let at weekly rents. The trustees are justified in paying a person to collect these rents, and do not, therefore, lose their annuities.

JOSHUA WILKINSON bequeathed, to his acting trustees for the time being, the yearly sum of 5*l.* 5*s.* a piece, so long as they should respectively live and the trusts of his will should continue, as a small recompense for the care and trouble they might have in the execution of the trusts, and appointed them his executors.

Amongst other property the testator was entitled to about fifty houses in London; thirty-four of which were let at weekly rents. The trustees employed a person to collect those rents. The master, on their passing their accounts before him, allowed them the salary paid to such collector. An exception was taken to the master's report on account of that allowance.

Mr. *Garratt*, in support of the exception, relied on the gift, of the five guineas yearly to the trustees as a recompense for their trouble; and also on the general doctrine of the court, that the office of trustee is gratuitous.

The VICE-CHANCELLOR:—It does not appear to me that the annuity of five guineas given to each trustee, makes any difference in this case. It is given to them as a recompense for the care and trouble which will attend the due execution of their office; and, if it be consistent with the due execution of their office that they should employ a collector to receive the rent, they will still be

[1] Vide *Stafford v. Brown*, 4 Raig, 88. A trifling variation was held immaterial. *Brown v. Keating*, 2 Beav. 581.



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entitled to the annuity. A provident owner might well employ a  
 [\*238] \*collector to receive such rent ; and the labor of such a collection cannot be imposed upon trustees.

Exception overruled.

### TYLDEN v. HYDE.

1825, 11th March.—*Power of sale.—Executors.*

Testator directed his real and personal property to be sold and divided amongst his sisters ; a power to the executors to sell the real property was implied.

THE question in this cause was whether the plaintiffs, who were the executors of the late Sir Samuel Auchmuty, had power under his will to convey to the defendant an estate which they had agreed to sell to him.

The testator, by his will, after giving several specific and pecuniary legacies, disposed of the residue of his property as follows :—“ The residue of my property, both landed and personal, I desire may be converted into money, lodged in government securities, and divided into four parts or shares ; the interest of one share to be given, during their lifetime, to each of my sisters Frances Montresor, Juliana Mulcaster, and Jane Tylden, and to my sister-in-law Henrietta Auchmuty ; on the death of either or all of my said sisters or sister-in-law that may survive me, or, at my death, if one or more of my said sisters do not survive me, the share set apart for such sister or sisters and sister-in-law to be divided among all the children of my said sister or sisters, and the children of my said sister-in-law by my brother Robert Auchmuty, [\*239] with the exception of his second son Robert Mulcaster \*Auchmuty, in the following manner ; two thirds of such share or shares to be equally divided among the sons of my said sisters and sister-in-law, and one third equally amongst the daughters. I request that Richard Tylden, Esq. and my nephew Sir Henry, and Major General Sir Thomas Montresor, Captain Mulcaster, royal navy, and Sir John and Major William Tylden, will act as executors to this my last will and testament.”

Three only of the executors proved the will and acted in the trusts of it. In pursuance of those trusts, they sold some of the testator's real estates to the defendant, who afterwards took objections to the title, and refused to complete his purchase, upon which the present bill was filed. On the title being referred to the master. he reported that the plaintiffs could make a good title to the estates, and that they could, by themselves, without the concurrence of any other party, legally and effectually convey the same to the defendant.

To this report the defendant excepted.

Mr. Sugden, and Mr. Jacob, in support of the exceptions :—The question as to a power to sell real estates being given, by implication, to executors, was

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discussed in *Bentham v. Wiltshire*.<sup>(a)</sup> Where the money to be produced by the sale is not dedicated to the payment of debts, the executors have no power to sell real estates. The rule laid down in *Bentham v. Wiltshire*, is, that the executors cannot sell, unless power is given \*to them, either [\*240] expressly or by necessary implication. It is not enough to show that it would be more convenient to have the sale made by the executors than by the heir at law. As to what is required to raise what is called a necessary implication, courts are now more strict; and there is nothing in this case strong enough necessarily to imply a power in the executors to sell the real estate. In *Patton v. Randall*,<sup>(b)</sup> the words were "the whole land and houses, together with the furniture and contents of the cellar, shall be sold." These words are much stronger than anything in the present will; because the direction to sell the furniture along with the houses, implied that they should be sold at the same time; and, as the furniture must have been sold by the executor, it was to be implied that he should sell the house also; yet the Master of the Rolls held that the executor had not, in that case, power to sell the real estate. No doubt convenience is always in favor of such a power being exercised by the executor; but no argument can be derived from that. The argument, that in order to distribute the fund produced by the sale it must be all in the hands of one person, would apply to every case of this kind; yet it is not allowed to prevail. Even where there is a devise to a trustee to sell, and a different person is appointed executor, if the trustee should die, the heir of the trustee must sell, and the executor cannot exercise the power. Here the testator has omitted to say by whom the power of sale is to be exercised; and, therefore, the heir at law, being the person on whom the legal estate is devolved by the law, is the party to exercise the power, and must join in the conveyance.

\*Mr. *Horne*, and Mr. *Boteler*, for the plaintiffs, were stopped by the [\*241] court.

The VICE-CHANCELLOR :—Where there is a general direction to sell, but it is not stated by whom the sale is to be made, there, if the produce of the sale is to be applied by the executors in the execution of their office, a power to sell will be implied to the executors.

Here the produce of the sale is to be confounded with the personal property, which must necessarily be divided by the executors; and, by the rule which I have stated, a power to sell is therefore implied to the executors.

Exceptions overruled.

(a) 4 Madd. 44.

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(b) 1 Jac. & Walk. 189.

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 1895.—*Jones v. Lewis.*


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[\*242]

\*SHACKLETON v. SHACKLETON.

1895, 14th March.—*Mortgages.—Costs.*

Where a legacy is charged upon land, and the price of the land is insufficient to pay the legacy, a mortgagee of the devisee of the land shall not be allowed his costs in a suit against him, and the devisee for payment of the legacy.

THIS was a bill by a legatee, whose legacy was charged upon land, to have the legacy raised by a sale. The devisee of the land charged with the legacy had mortgaged it before the bill was filed, and the mortgagee was necessarily made a party to the suit.

It appeared upon the master's report, after a sale made before him, that the purchase-money would not be sufficient to pay the legacy in full.

The cause now came on to be heard for further directions, and the Vice-Chancellor refused to give the mortgagee his costs out of the price, stating that the legatee was not to be put to expense by the improper conduct of the devisee, or the folly of his mortgagee.

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 JONES v. LEWIS.
1895, 14th March.—*Practice.—Production of instruments.*

Production of an instrument in the plaintiff's possession ordered upon motion, supported by affidavit that the defendant believed the instrument to be forged, and that he could not fully answer the bill before he inspected it.

THE bill was filed for the specific performance of an agreement, alleged to have been made by Rees Price, deceased, on the plaintiff's marriage with one of his daughters, for the conveyance of an estate to the plaintiff, but which, by a will made subsequent to the date of the alleged agreement, he had devised to the defendants.

[\*243] \*The defendants now moved that the plaintiff might, within a week, leave the agreement in the hands of his clerk in court, for their inspection, and that they might have three weeks further time to answer, after inspecting the agreement.

This motion was supported by an affidavit made by the defendants, one of whom was a daughter of the testator and had lived with him, in which they deposed that they had never heard, and did not believe that the testator had ever entered into any such agreement: that they believed it to be a forgery; and that they were unable fully to answer the bill, without, first of all, being permitted to have an inspection of the agreement.

Mr. Lynch, in support of the motion, relied on *The Princess of Wales v. The Earl of Liverpool*. (a)

Mr. Horne, contra, said that the case cited was an exception to the general

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rules of the court ; and that a party could not be compelled to give a discovery without having an opportunity of stating, at the same time, his own case upon the record.

The VICE-CHANCELLOR :—The doctrine that the plaintiff must produce an instrument stated in his bill, previous to the defendant's answering the bill, where it is plainly necessary to enable the defendant to make a full defence, is recognized in the case of *The Princess of Wales v. The Earl of Liverpool*, [1] and had been previously laid down in *The Practical Register*, (b) and is obviously required by the first principles of justice. [2]

\*The affidavit filed upon this application, where it is sworn that [\*244] the instrument is believed to be forged, establishes the necessity in the present case.

Take the order that the defendants have a fortnight's time to answer after the plaintiff shall have left the agreement in the hands of his clerk in court. [3]

#### HARTLEY V. RUSSELL.

1825, 14th March, 1st June.—*ChamPERTY*.

Where a creditor who had instituted proceedings at law and in equity against his debtor enters into an agreement with the debtor to abandon those proceedings and give up his securities, in consideration of the debtor giving him a lien on securities in the hands of another creditor, with authority to sue such other creditor and agreeing to use his best endeavors to assist in adjusting his accounts with the holder of the securities, and in recovering his securities : Held that the agreement does not amount to *champerty*, but would have done so if it had stipulated that the creditor should maintain the proceedings instituted by the debtor against the holder of the securities, in consideration of the profits to be derived by the debtor from the suit.

This was a suit for the specific performance of an agreement.

The bill was filed on the 7th of August 1824, and stated that, on the 12th of February 1824, the defendant Joshua Russell filed his bill in this court

(b) See p. 161.

[1] Walworth Ch. 5 Paige, 549, says that this case "has always been considered as a political decision."

[2] Vide *Sheppard v. Morris*, 1 Beav. 175. In a controversy between partners, the plaintiff, who was the managing partner, was appointed receiver, and on an application for an order to produce books and accounts, Lord Cottenham said ; "As a plaintiff I consider it perfectly clear that he is not subject to be called upon by an adverse application, to produce documents in his possession. It is very different after a decree which orders it. In the present instance I consider the plaintiff merely as receiver of property common to both parties ; and I apprehended it to be quite clear that, having some documents in his possession relative to his accounts, it is right to make an order to compel him to produce them to the other party. If he has kept accounts at all, they must include some items relative to the partnership affairs. Clearly the court has, and I apprehend the master ought to have, power to compel the plaintiff to produce all accounts kept by him of the partnership." An order was made to produced before the master books or accounts relating to the partnership estate, with liberty to seal up such parts as should appear by his affidavit not to relate to the subject. *Maund v. Allies*, 4 Myln. & Cr. 503.

[3] This case and *The Princess of Wales v. Earl of Liverpool*, are overruled. The defendant is at liberty to call upon the plaintiff to produce documents, without which he says he cannot an-

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against the defendant James Collins, a solicitor of the court, setting forth that in the years 1811 and 1812, he, Russell, was extensively engaged in the sale and purchase of estates; and that, in the beginning of the year 1812, he had occasion to borrow the sum of 1,000*l.*, and applied to the defendant Collins who agreed to lend him that sum upon the security of a mortgage; that a mortgage was accordingly prepared for securing repayment of 1,000*l.* and interest on certain estates, and that Collins charged 55*l.* for the expenses of preparing the mortgage deed.

and 150*l.* as his commission for lending the money; and, instead of [\*245] \*paying the 1,000*l.* to Russell, paid him only 795*l.*, being what remained after deducting these charges; that afterwards, in the same year, Russell wanted to borrow the further sum of 600*l.*; and applied to Collins, who agreed to lend it upon the security of another mortgage, and, accordingly, prepared a mortgage-deed for that purpose; and, after deducting the sum of 33*l.* for the expenses of preparing this deed, and 90*l.* as his commission for lending this further sum, paid over to Russell the sum of 477*l.* only, instead of 600*l.*, and took the mortgage to secure repayment of 600*l.* and interest at five per cent; that Russell employed and consulted with Collins as his confidential solicitor, and that various pecuniary transactions afterwards took place between them by discounting bills and by Collins lending him money, and that, from time to time, securities were taken by Collins for the sums in which Russell was so indebted to him, and that annuities were also granted by Russell to Collins, and that, in the accounts made up from time to time by Collins of the transactions between them, there were many improper charges, and many sums paid by Russell for which no credit was given, and that the accounts were made with improper rests, so as to charge compound interest against Russell; that in 1817 a commission of bankrupt was awarded against Russell, and that Collins was a mortgagee, under the various securities already mentioned, at the time of the bankruptcy, and alleged that large sums were due to him, but never attempted to prove any debt under the commission; that, soon after Russell had obtained his certificate under the commission, he entered into an agreement with his assignees to take upon himself the settlement of all

his accounts with Collins, and the assignees agreed to convey to him [\*246] all his equity of \*redemption under the various mortgages which he had executed to Russell, and this agreement was authorized by the creditors at a meeting called for the purpose, and deeds were executed by which the agreement was carried into effect, and that Russell was thus entitled to any balance which might, upon a just settlement of accounts, appear to be

owed; and if the plaintiff refuses, he cannot complain that the answer is insufficient. If the defendant requires them for the purpose of his defence, he ought to file a cross bill against the plaintiff for a discovery of them. *Penfold v. Nunn*, 5 Sim. 405; *Milligan v. Mitchell*, 6 Sim. 186; *Lupton v. Johnson*, 2 Johns. Ch. Rep. 429; *Denning v. Smith and others*, 3 Johns. Ch. Rep. 409; *Hare v. Collins*, 1 Hog. 193. But where, as in a suit between partners, each has an equal title to the books of account or other documents, they will be ordered to be deposited with the proper officer of the court for the inspection of the opposite party. *Kelly v. Eckford and others*, 5 Paige, 548.

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due from him to Collins at the time of the bankruptcy; that Collins knew of this agreement and adopted it, and carried on and continued his transactions and accounts with Russell as if he had not become a bankrupt, and, in 1821, 1822 and 1823, delivered to Russell various statements of accounts and bills of costs containing exorbitant and improper charges, but that they were not signed; and praying that Collins might be decreed to deliver in, and sign, proper bills of costs; that such bills might be taxed, and that an account might be taken of all the dealings and transactions between Russell and Collins, and that Russell might be let in to redeem the mortgaged estates upon payment of what should be found due on taking the accounts.

The present bill then stated that, on the 16th of February 1824, which was only four days after the first bill was filed, the plaintiff James Hartley, entered into the following agreement with the defendant, Russell.

"Whereas the said James Russell is and stands indebted to the said J. Hartley, in the sum of 250*l.* for money lent and advanced by said J. Hartley to and for the use of said J. Russell, together with interest thereon from the 23d day of March 1823, and costs, and, as a security for the repayment thereof, the said J. Russell and also Edward Wildes signed an \*undertaking [\*247] to execute to the said J. Hartley a transfer of a mortgage-debt due to them on an estate at Maidstone; and whereas the said J. Russell is indebted to the said J. Hartley in the further sum of 250*l.* on a bill of exchange dated the 20th of December 1822, drawn by the said J. Russell upon and accepted by one J. Hopgood, and payable three months after date, together with interest thereon from the 23d day of March 1823 and costs, which said bill of exchange the said J. Hartley hath proved under a commission of bankrupt issued against the said J. Hopgood, but no dividend hath been received under the said commission; and whereas the said J. Hartley hath commenced proceedings at law against the said J. Russell to compel payment of the two several sums of 250*l.* and 250*l.*; and hath also instituted a suit in equity against the said J. Russell and Edward Wildes to compel a specific performance of his said undertaking, and the same are now pending; and whereas the said J. Russell hath, for many years past, had various dealings and transactions with James Collins, of Spital-square in the county of Middlesex, solicitor, the said J. Collins hath advanced to the said J. Russell divers sums of money, for securing which the said J. Russell hath, from time to time, deposited with the said J. Collins various deeds and other securities to a large amount, and, in the course of such dealings and transactions as aforesaid, the said J. Collins hath acted as the attorney and solicitor of the said J. Russell, and the said J. Collins hath made out and delivered to the said J. Russell several bills of fees and disbursements for a large amount, which the said J. Russell conceives to be extravagant and overcharged, and the said J. Collins hath commenced proceedings at \*law [\*248] against the said J. Russell, to recover the alleged balance of his account; and whereas the said J. Russell hath requested the said J. Hartley to institute proceedings against the said J. Collins for an account of the various dealings

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and transactions between them, and for the delivery to the said J. Russell of the various deeds and securities in the possession of the said J. Collins, and to tax his several bills of costs; and whereas the said J. Russell hath requested the said J. Hartley to relinquish his claim on the mortgage-debt secured on the estate at Maidstone, and to deliver up the title deeds thereto to the said E. Wildes, and to suspend all further proceedings at law and in equity in respect of the said two several sums of 250*l.* and 250*l.*, and, in consideration thereof, the said J. Russell hath proposed to execute such deed or instrument as may be deemed necessary to give to the said J. Hartley an effectual lien on the several securities now in the hands of the said James Collins, for the securing to the said J. Hartley the payment of the said two several sums of 250*l.* and 250*l.*, together with interest or costs due or to accumulate thereon, which he the said J. Hartley hath consented and agreed to do, and to liberate the said J. Russell from custody in respect of the said actions: now these presents witness that, for the considerations hereinbefore mentioned, the said J. Russell doth, for himself, his heirs, executors and administrators, hereby covenant, promise and agree with the said J. Hartley, in manner following, (that is to say,) that he the said J. Russell, his heirs, executors and administrators shall and will, when hereunto required, execute to the said J. Hartley, such further

deed or instrument, as may be deemed necessary or requisite, for giving  
 [\*249] effect to the lien on the securities now in the hands of the said J. Collins for securing to the said J. Hartley the payments of the said two several sums of 250*l.* and 250*l.*, together with all interest due and to accrue due thereon, and all costs and charges and expenses incurred or to be incurred in respect thereof: and the said J. Russell doth hereby further covenant, promise and agree with the said J. Hartley, that he the said J. Russell shall not nor will impede or obstruct the said J. Hartley in taxing the bills of costs, and obtaining and balancing the accounts of the said J. Collins, nor shall not nor will execute any release to the said J. Collins, nor do any other act whatsoever to prevent the said J. Hartley from procuring the securities now in the possession of the said J. Collins, but shall and will use his best endeavors to assist the said J. Hartley to adjusting and balancing the account of the said J. Collins, and obtaining the securities in his hands: and, for the consideration hereinbefore contained on the part of the said J. Russell, the said J. Hartley doth hereby agree to sign a discharge to the said actions: and it is hereby further agreed, between the said parties hereto, that all dividends or sums of money which may be received under the commission of bankrupt against J. Hopgood shall be accounted for by the said J. Hartley with the said J. Russell: and lastly, for the performance of this agreement on the part and behalf of the said J. Russell, he the said J. Russell doth hereby bind himself, his heirs, executors and administrators unto the said J. Hartley, his executors, administrators and assigns in the penal sum of 600*l.*”

The bill then stated that the plaintiff had, in all respects, performed the agreement on his part; but that Russell had colluded with Collins for the

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purpose of depriving \*the plaintiff of the benefit of the agreement: [\*250] and that Russell intended to dismiss his bill against Collins, and to release the equity of redemption of the various mortgages, and to impede and obstruct the plaintiff in taxing Collins' bills of costs, and in the settlement of his accounts: and it prayed that the agreement between Russell and the plaintiff might be decreed to be specifically performed, and that the plaintiff might be decreed to be entitled under the agreement, to the benefit of the suit instituted by Russell against Collins, and that both Russell and Collins might be restrained by injunction from dismissing the bill in that suit, and from executing any releases or deeds contrary to the agreement between Russell and the plaintiff, and for general relief.

To this bill the defendants Russell and Collins put in general demurrers.

Mr. *Pemberton*, in support of the demurrers:—The agreement of which the plaintiff seeks to have a specific performance, is such as cannot be countenanced or acted upon by the court. Any agreement to maintain a suit for the sake of benefits to the attorney in prosecuting the suit, is illegal. *Wood v. Downes*(a) is a case in which an agreement of the same nature was held to be void, and was decreed to be cancelled.

Mr. *Wakefield*, for the bill:—Unless the court is prepared to hold that an equity of redemption cannot be assigned, or that a party who files a bill to redeem a mortgage is thereby restrained \*from creating any [\*251] further incumbrance on the equity of redemption, the plaintiff must be held to be legally entitled to the specific performance of the agreement set forth in the bill. The mortgages were taken for advances from time to time for nominal sums, but subject to an account of the sums actually advanced. It would be a new doctrine to hold that, because the mortgages are of that nature, the mortgagor cannot deal with the equity of redemption. Even if the mortgages were usurious, the mortgagor is still equally entitled to the benefit of his equity of redemption, and can have the benefit of it by filing his bill to have the usurious demand cut down.

Mr. *Pemberton*, in reply:—This is not at all a simple bill to redeem. The object of the first suit is to have accounts opened, and to have transactions rescinded on the ground of usury. The agreement is to give to Hartley the benefit of prosecuting that suit. The plaintiff in a suit may give an assignment of the rights for which he sues, and leave the assignee to prosecute those rights. But this is an agreement which gives a right to prosecute one particular suit, and continue a litigation the expenses of which are to be defrayed out of the fund. It is all one agreement; and, if not good in every part of it, it must fail altogether. So far as it gives the right to prosecute that suit it saves of champerty, and is illegal.

The VICE-CHANCELLOR:—The agreement in question recites that Russell, being indebted to Hartley in two sums of 250*l.* each and interest, secured in



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manner therein mentioned, and that Hartley having instituted proceedings, both at law and in equity, to enforce the payment of the moneys due to him, it had been agreed between Hartley and Russell that Hartley should give up his present securities and should abandon his proceedings at law and in equity, in consideration that Russell would give him an effectual lien on the several securities of Russell which were in the hands of Collins; and it is recited that Russell had requested Hartley to institute proceedings against Collins for an account of the various dealings and transactions between Russell and Collins and for the delivery to Russell of the various deeds and securities in the hands of Collins, and for the taxation of his costs; and Russell then covenants that he will, when required by Hartley, execute such further instrument as he shall think necessary for giving full effect to his lien on the securities in the hands of Collins, and that he will not impede or obstruct Hartley in taxing Collins' costs, or in settling his accounts, or in doing any other act for obtaining the securities from Collins, but will use his best endeavors and assist Hartley in settling Collins' accounts and in procuring his securities.

There is here, therefore, no bargain, or color of bargain, that Hartley shall maintain the suit instituted by Russell against Collins in consideration of sharing in the profits to be derived to Russell from the success of that suit, which is essential to constitute champerty. It is, in effect, nothing more than an agreement by Russell to assign to Hartley his equity of redemption in the securities held by Collins, in exchange for the prior securities which Hartley had held. The covenant that Russell would not impede or obstruct Hartley in the taxation of Collins' costs, and in the settlement of Collins' accounts, and the recital that Russell had requested Hartley to carry on proceedings against Collins, import the intention of the parties that Hartley should have authority to act against Collins as the attorney and in the name of Russell. But this is a legal and common provision in the case of the assignment of a debt or security.

The specific relief sought by this bill is however extremely singular; that Russell shall not dismiss his bill against Collins and that neither Russell nor Collins shall do any act in contravention of the agreement between Hartley and Russell. The plaintiff ought, as assignee of the equity of redemption of the securities of Russell in the hands of Collins, to have prayed the accounts of all transactions between Russell and Collins, and a redemption by the plaintiff upon payment of what should be due in case Russell should not pay to the plaintiff the amount of what was due to him from Russell.

But the question upon demurrer is, not whether the plaintiff is entitled to all the relief prayed, but whether, upon the case made by the bill, he may, under the prayer for general relief, be entitled to some relief. These demurrers must therefore be overruled.[1]

[1] The mere assignment of the subject of a suit is not maintenance; but if the purchaser give an indemnity against all costs that have been, or may be incurred by the seller in the prosecution of the suit, the transaction amounts to maintenance. *Harrington v. Long*, 2 Mylne & Keene, 590.

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\*GILBERT v. WETHERELL.

[\*254]

1825, 18th and 19th March.—*Advancement.—Release of debt.—Evidence.*

A father lent a sum to his son to enable him to engage in trade, and took his promissory note for it ; and afterwards persuaded his son to continue the trade against his inclination, whereby the son suffered great losses. The father on his death-bed caused the promissory note to be burned, and died intestate ; held that the burning of the note amounted in, in equity, to a release of the debt, and that the sum which remained due upon it was an advancement to the son.

If a party in a cause examine another party before the master, this examination may be read by the master as evidence upon the matter referred to him although the party who examined declined to use it before the master.

THOMAS WETHERELL died intestate, leaving the plaintiff, Mary the wife of P. Gilbert, and the defendants, Charles and Thomas Wetherell his three children and only next of kin. This suit was instituted for the administration of his estate.

By the decree made at the hearing of the cause it was referred to the master to inquire whether the intestate made any advancements to his children, and under what circumstances they were made, with liberty to state special circumstances and to make a separate report.

The following facts appeared by the examinations taken before the master, under the decree. In November 1805, the intestate lent the defendant Thomas Wetherell 10,000*l.* to assist him in forming a partnership in the business of a sugar-refiner, and took his promissory note for the repayment of that sum on demand. Thomas Wetherell, from time to time, paid various sums, amounting altogether to 3,538*l.*, in reduction of the 10,000*l.* On the 31st of December 1811, he signed an account which stated a balance of 9,128*l.* 7*s.* 6*d.* to be then due from him to the intestate. In the year 1812, owing to heavy losses which he had sustained in a separate trade carried on by him, he was obliged to stop payment, and, to prevent a commission of bankrupt being sued out against him, assigned over all his stock in trade and other convertible property for the \*benefit of his creditors, on their agreeing to give [\*255] him time for the liquidation of their various demands. A great part of the stock in trade thus assigned, consisted of sugars which, from the then state of the market, could not be sold but at a very great disadvantage ; but it was hoped that sufficient time would be given to have it advantageously disposed of. Before, however, a favorable change took place in the markets, the creditors became so urgent for the immediate conversion of the property into money, that, in order to avoid the loss which an immediate sale would have occasioned, the intestate, to relieve his son, made an arrangement with the creditors, by which he accepted bills of exchange for the full payment of their several debts, with interest, by four instalments ; and the whole of the sugar and other property of the son was transferred and delivered over to the father. The whole property thus transferred to the intestate, was sold under the most favorable circumstances which the situation of the parties

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admitted of; but, instead of any surplus remaining to go in diminution of the debt due to the intestate himself, he remained greatly in advance, on account of the payments made by him to the creditors.

On the 12th of March, 1814, which was about ten days previous to his death, and during his last illness, the intestate desired his daughter, the plaintiff Mary Gilbert, who was in attendance upon him, to bring him his pocket-book; which she accordingly did. The intestate then took the promissory note for 10,000*l.* out of the pocket-book, and put it into the hands of [\*256] Mrs. Gilbert, and desired her to burn it; which she \*immediately did in the intestate's presence. When it was burnt, the intestate said, "Now Thomas owes me 11,000*l.*"

Thomas Wetherell, in his examination before the master, stated that it was in consequence of the urgent desire of the intestate that he had engaged in the business of a sugar-refiner; and that in August 1809, finding that it was a losing concern, he became desirous of retiring from it; but that the intestate urged him to continue it; that, at the earnest desire and intreaty of the intestate, and to his own manifest disadvantage, he, after much hesitation, continued the business, and sustained such heavy losses in it, that, in November 1811, his share of the losses exceeded the amount which remained due in respect of the promissory note for 10,000*l.* He also stated that the intestate, when he took a transfer of all his stock in trade, agreed to take the surplus (if any) after payment of all the other creditors, in discharge of the debt due to himself; and that this arrangement was always looked upon, and spoken of by the intestate as an extinguishment, or satisfaction of the debt due to him; that the burning of the promissory note on his death-bed was evidence that he considered it satisfied; and that the intestate, at various times, in conversations with different persons, acknowledged that the examinant's losses in trade were owing to his (the intestate's) fault and obstinacy, as he would have the examinant persist in continuing the trade, contrary to his own inclination; but that the examinant should not be a sufferer. Several witnesses examined in the cause on behalf of the examinant, proved that the intestate had used some such expressions in conversation.

[\*257] \*The master, by his separate report, stated that the plaintiffs had brought in a charge against the defendant Thomas Wetherell, by which they charged that he had received from the intestate, his father, in his life-time, several sums of money by way of advancement; and that, on the 31st of December 1811, the defendant Thomas Wetherell signed an account, by which it appeared that the sum of 9,128*l.* 7*s.* 6*d.* was then due from him to the intestate; but the master reported that this sum of 9,128*l.* 7*s.* 6*d.*, or any part of it, was not an advancement by the intestate to the defendant, Thomas Wetherell, within the 22 & 23 Charles 2, c. 19.

Exceptions were taken to this report: but, when they came on to be argued, the master had not made his general report; and, on its being suggested that the master, though he had not reported the sum of 9,128*l.* 7*s.* 6*d.* to be an

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1825.—Gilbert v. Wetherell.

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advancement, might report it to be a debt due from the defendant, Thomas Wetherell, to the intestate's estate, the exceptions were ordered to stand over until the master should have made his general report.

The master did not, by his general report, state this sum to be a debt; and exceptions were also taken to the general report.

The exceptions to the master's reports now came on to be argued.

Mr. *Sugden*, and Mr. *Stuart*, for the plaintiffs, and Mr. *Horne*, and Mr. *Garratt*, for the defendant Charles Wetherell, in support of the exceptions, insisted that \*the 10,000*l.*, or what remained unpaid in re- [\*258] spect of it, must be considered, either as an advancement by the intestate to the defendant Thomas Wetherell, or as a debt due from Thomas Wetherell to the intestate's estate; that the burning of the promissory note did not amount in law to a release of the debt; that, as to the losses in the sugar-refining business, the intestate did not mean to consider them as affecting the debt due to him; because the account stated in November, 1811, by which the balance of 9,128*l.* 7*s.* 6*d.* appeared in favor of the intestate, was stated after those losses had occurred; that, there having been not only no surplus remaining towards payment of the debt to the intestate after he had paid the other creditors out of his own moneys, but an increase of the debt due to him, it was impossible to consider the transfer of the stock in trade to him as a satisfaction of the debt; and that, if the burning of the note could be held to amount in equity to a release of the debt, it must then be considered to be an advancement.

Mr. *Heald*, and Mr. *Roupell*, for the defendant, Thomas Wetherell, insisted that the whole transaction and the expressions used by the intestate, showed that he considered the debt as satisfied, and not chargeable, in any shape, against Thomas Wetherell; and therefore, that the master had rightly reported that it was neither a debt nor an advancement.

The Vice-Chancellor said he must hold that the circumstances under which the note had been destroyed amounted to an equitable release of the debt; but that the sum of 9,128*l.* 7*s.* 6*d.*, the balance which appeared \*due, in respect of the sum for which the note was given by the ac- [\*259] count stated in December, 1811, was to be considered as an advancement.

The decree allowed those exceptions which proceeded on the ground that the 9,128*l.* 7*s.* 6*d.* had not been reported an advancement: referred it to the master to take an account of what was due from Thomas Wetherell to the intestate at his death, and directed him to take the balance of 9,128*l.* 7*s.* 6*d.* on the stated account, as part of the debt; and declared that the amount of the debt at the testator's death was an advancement to the defendant Thomas Wetherell.[1]

In this case the plaintiffs examined the defendant, Thomas Wetherell, on interrogatories in the master's office; but declined to read his examination;

[1] Vide 1 Sim. & Stu. 3, note.

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and, at the hearing of the exceptions, objected to his examination being read, as it had not been used by them in the master's office.

The Vice-Chancellor, after communicating with the master, stated that by the practice of their offices this examination was evidence before the master upon the matter referred to him, and might be read by the master, although the party who exhibited the interrogatories declined to use it. His honor therefore allowed the defendant Thomas Wetherell's examination to be read.

[\*260]

\**KNYE v. MOORE.*

1825, 22d, 23d and 28th March.—*Deed.—Seduction.—Turpis contractus.*

A bond for securing a provision for a woman who had been seduced by the obligor, and for her children, given after cohabitation determined, is good, notwithstanding the obligor was married when the connection commenced.

THIS case was first brought before the court upon demurrer; and is reported *ante* 1 vol. 61. The bill was afterwards amended, and the cause now came on to be heard upon bill and answer. It appeared that the deed alluded to in the former report was a bond, which the defendant executed to T. H. his confidential solicitor, for securing 100*l.* per annum to the plaintiff Sophia Knye, for her life, if she should survive the defendant, and 500*l.* to each of her children, on their attaining the age of twenty-one, with interest in the mean time. Two of the children having afterwards died, the defendant got possession of the bond, and destroyed it; and then executed another bond to T. H. by which he reduced the mother's annuity to 50*l.* but made the same provision for the children as before.

The mother having afterwards refused to comply with a request, made to her on the defendant's behalf, to leave the place in which she had resided ever since she had quitted the cottage, and to remove to a greater distance from the defendant's house, the defendant obliterated so much of the last bond as related to her annuity.

The object of the amended bill was to compel the defendant to execute another bond to the same tenor as the first, or at least as the second.

The answer asserted that the first bond was executed during the co-  
[\*261] habitation, and before any separation \*between the plaintiff Sophia Knye and the defendant was in contemplation.

Mr. *Sugden*, and Mr. *Spurrier*, for the plaintiff, commented strongly upon the conduct of the defendant and cited *Cary v. Stafford*,<sup>(a)</sup> and *Atkins v. Farr*.<sup>(b)</sup>

Mr. *Lovat*, and Mr. *Stinion*, for the defendant—It has been said, for the plaintiff, that this a case in which the defendant was bound to make a provision

(a) Amb. 590.

(b) 1 Atk. 287.

1825.—*Knye v. Moore.*

for the mother and children. Undoubtedly he was bound to provide for the mother, by moral obligation, and for the children, by law. But this is not the case of a provision to be enforced in a court of equity. There is nothing executory here. No agreement is recited : but there are bonds actually executed. The first bond must be put out of the question, and the argument confined to the second only. No doubt, if a bond is given for past cohabitation, it will be enforced in a court of law ; and, if the obligor gets possession of and destroys it, equity will enforce the giving of a new one. But the circumstance of the defendant being a married man makes the case entirely different. There is not a single instance of relief being given, either at law or in equity, where one of the parties was a married man. The cases cited by the plaintiff's counsel are not disputed ; but it does not appear that any one of the parties in those cases was married. With respect to the second bond there is no doubt that it was given after the cohabitation had ceased. But on that point, *Priest v. Parrot*(c) is conclusive. If this bond is bad as to the mother, it is bad as to the children ; for there is no case in which \*a deed which is bad in [\*262] part can be good for the remainder. Suppose a bond was given for securing 1,000*l.* to A. if she committed murder, and to secure a provision for the natural children of the obligor by A.; such a bond could not be enforced. If then this bond is bad as to the mother, it cannot be enforced as to the children. Under these circumstances, and upon the authority of *Priest v. Parrot*, this bill must be dismissed.

Mr. *Sugden*, in reply :—The whole of the argument for the plaintiff rests upon *Priest v. Parrot*. Now if there ever was a case in which a court of equity would refuse relief, it was that case. It was quite clear that the provision was for continued cohabitation. Lord Hardwicke, says, “ when a man takes and keeps a mistress under the nose of his wife, who thereupon leaves her husband, that is such a crime as stares every one in the face ; and that is this case.” It is fairly deducible from the judgment that the defendant, before the separation, made the settlement, in order to induce the plaintiff to continue to live with him. In no other case has the circumstance of the man being married been brought under the consideration of the court. In Lord Annandale's case the dates follow each other so closely, that it is probable that he was married. In the house of lords it is treated as a valid transaction, if the deed was properly executed. The defendant in this case was bound to make a provision for this woman, and he was bound by legal obligation to provide for the children. If the mother of illegitimate children is unprovided for, this court will give the provision for the children to the mother. Supposing this bond had been given during cohabitation, it would have been legal as to the children ; \*for, if he had abandoned them, the law would have compelled [\*263] him to provide for them. He could not effectually provide for the children, unless he provided for the mother, under whom they were to be

(c) 3 Ves. 160 ; and see *Belt's Supplement*, 313.

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brought up ; and it makes a material distinction where the provision is not to take place until his death, because he might leave the mother what he pleased. The plaintiffs do not ask a court of equity to give them the money due on the bond ; but, as there was a bond actually executed, deposited with a third person and declared to be a deed remaining with that person in trust, this bill is to compel the defendant to place the plaintiffs in the same situation as they stood in before he destroyed that deed : and whether the new deed can or cannot be recovered upon, will be a question hereafter to be decided in a court, either of law or of equity. It has been decided at law that a deed may be good in part, and bad in part.<sup>(e)</sup> There the statute declared the deed bad ; but it was declared good as to part ; and, therefore, the first bond, if void as to the mother, was good as to the children. Then, as to the second bond. The cancellation of the first was a good consideration for the second ; for the getting rid of an infirm security has often been held to be a good consideration for a valid one ;<sup>(f)</sup> and, as the cohabitation had ceased at the date of this second bond, it is clear that it is good, both at law and in equity. *Priest v. Parrot* has nothing to do with the case, because there the security was given during the cohabitation.

After this case had been argued, the Vice-Chancellor referred to the [\*264] entry, in the registrar's book, of the \*cause of the *Marchioness of Annandale v. Harris*, and to the record of *Priest v. Parrot* ; and now delivered judgment as follows :

28th March.—Upon reference to the record itself, in *Priest v. Parrot*, it does not appear, either upon the pleadings, or in the depositions, whether the security in that case was given during the cohabitation of the parties, or after the cohabitation determined : and it does not, therefore, necessarily follow that the judgment in that case did proceed upon the distinction, which the reporter attributes to Lord Hardwicke, between the case of an unmarried and a married man. It is further to be observed that, upon reference to the registrar's book in the case of *Annandale v. Harris*, it does not appear whether Lord Annandale was or not a married man at the time of his cohabitation with Miss Harris ; and it seems manifest that such circumstance formed no ingredient, either in the argument or the judgment. In the case of *Priest v. Parrot*, Lord Hardwicke is not reported to have said that there can in equity be a different principle upon this subject from that which prevails at law ; and he is made to give, as a reason for refusing relief there, that an action could not be maintained upon such a bond at law.

I think it, therefore, the proper course in this cause to send a case to a court of law for its opinion upon the point, whether the circumstance of the defen-

(e) *Mouys v. Leake*, 8 T. R. 411.

(f) See *Cuthbert v. Haley*, 8 T. R. 390 ; *Barnes v. Hedley*, 2 Taunt. 184 ; *Wright v. Wheeler*, 1 Camp. 165, n.

1825.—*Ocklestone v. Benson.*

dant's being a married man at the time of cohabitation with the plaintiff, does, or not, form a good ground of defence at law to an action upon such a bond. By stating the bond to have been given for an immediate annuity, and not for an annuity to commence at the death of the defendant, and \*by [\*265] stating the annuity to be in arrear, there will be no difficulty in obtaining the opinion of a court of law upon the point. Let a case be stated, therefore, for the opinion of the court of common pleas accordingly; and reserve the consideration of further directions and of costs until such opinion is obtained.[1]

OCKLESTONE v. BENSON.

1825, 14th April; 1st June.—*Bankrupt.—Pleading.*

To a bill by assignees of a bankrupt against a creditor, a plea that the suit was not instituted with the consent of the creditors at a meeting, pursuant to the 5 Geo. 2, c. 30, s. 38, was allowed.

THIS was a bill for an account by the assignees of a bankrupt against an alleged debtor. The defendant put in the following plea:—"That by the statute made and passed in the fifth year of the reign of his majesty King Geo. 2, intituled, an act to prevent the committing of frauds by bankrupts,(a) it is provided that no suit in equity shall be commenced by any assignee or assignees without the consent of the major part in value of the creditors of such bankrupt who shall be present at a meeting of the creditor pursuant to notice to be given in the London Gazette for that purpose: and this defendant doth aver that the said bill was filed by the plaintiffs, as the assignees of the estate and effects of the said bankrupt, Thomas Cassidy, without the consent of the major part in value of the creditors of the said bankrupt present at a meeting of the creditors pursuant to notice given in the London Gazette for that purpose: and this defendant doth therefore plead the matters aforesaid, &c."

\*Mr. Lowndes, in support of the plea:—It is but reasonable that the [\*266] assignees should, in the outset, have the sanction of the creditors.

*Ex parte Whitchurch*(b) decided that the creditors cannot give a valid, general authority to assignees to institute suits, but there must be a meeting to sanction each suit. *Wilkins v. Fry*.(c) There is, indeed, a case, *Franklyn v. Fern*(d) in Barnardiston's Reports, (a book of no authority,) in which it is stated that any creditor may, of his own authority, institute a suit at the peril of costs.

Mr. Pemberton, for the bill:—The case of *Franklyn v. Fern* is good law, and proceeds on the principles laid down in *Elmslie v. Macaulay*.(e) and other

(a) C. 30, s. 38. (b) 1 Atk. 90. (c) 1 Mer. 244. (d) Barnard. 30. (e) 3 Bro. C. C. 624.

[1] Vide S. C. under the name of *Nye v. Moseley*, 2 Sim. 161.



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 1825.—Gray v. Chaplin.
 

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cases, where there is collusion between the assignees and the debtor. In a case of *Godfrey v. Langham* in this court in July, 1822, which is not reported, the very point now in question was decided, by overruling a demurrer which was put in on the ground that the consent of the creditors to the suit was not alleged in the bill pursuant to the stat. 1 Geo. 4, c. 119, s. 11.

This case stood for judgment; the Vice-Chancellor wishing to ascertain whether he had any note of the case of *Godfrey v. Langham*.

The VICE-CHANCELLOR :—I do not find, by any printed report, that this point has ever been decided. It is said that it was in some measure [\*267] touched upon in a case before me of *Godfrey v. \*Langham*, but I have no note of that case. If the creditors are not bound by the result of a suit which is commenced by the assignees without the consent of the creditors, then it is not fit that the defendant should be vexed by a suit which, at the pleasure of the creditors, may be to him fruitless. And, if the creditors are bound by such a suit, then it is fit that a plea should be favored which is in furtherance of the purposes of the statute.

Plea allowed.[1]

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#### GRAY V. CHAPLIN.

1825, 15th and 27th April.—*Pleading*.

One of the shareholders of a canal is entitled to file a bill on behalf of himself and the other shareholders, to set aside an agreement made by the commissioners of the canal contrary to the provisions of the act under which the canal was made; because whatever benefits may be reserved to the shareholders by the agreement, they must all be considered as being interested in having the directions of the act complied with.

THE act of parliament under which the Louth navigation was made, authorized the commissioners appointed for putting the act into execution to borrow money on the security of the tolls; and enacted that, when the money so borrowed, or a competent part of it, should be paid off, the commissioners should reduce the tolls; and empowered the commissioners, from time to time, to lease the tolls for any term not exceeding seven years.

On the 27th of October 1777, an order or agreement was entered into between a certain number of the then acting commissioners, and Charles Chaplin, who was himself one of the commissioners, which, after reciting [\*268] that public notice had been given by advertisement, \*pursuant to the directions of the act, that a meeting would be held for the purpose of letting the tolls, but that no one appeared to take the same, and that, at a subsequent meeting, Mr. Chaplin had proposed to advance all the money neces-

[1] Acc. *King v. Tullock*, 2 Sim. 469. These decisions have since been expressly overruled; *Piercy v. Roberts*, 1 Mylne & Keene, 4; *Casborne v. Barsham*, 6 Sim. 317.

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sary for the repairs of the river, and to keep the same in good repair, subject to the order and directions of the commissioners for the time being, and to keep down the interest on all the money borrowed, by paying to every subscriber interest at five per cent, and to pay all officers' salaries and all other expenses attending the works, provided the commissioners would invest him with proper powers, and assign to him the benefit of the tolls for a term of ninety-nine years, and agree to join with him in obtaining an act of parliament, at his expense, confirming the agreement, whenever thereunto by him required, and that such proposal was approved of and accepted by the greatest part of the subscribers at the meeting, and had since been approved of by all other the subscribers, except three persons particularly named: it was thereby ordered and agreed, for the good of the navigation, and as the only method for raising the money necessary to put the same into proper and effectual repair, that the canal or cut and the navigation thereof, with all the tolls arising from the same, should be vested in Mr. Chaplin for a term of ninety-nine years, to commence from the 24th of June then last; and Mr. Chaplin agreed to accept the trust, and do all the works which should be ordered to be done by the commissioners for the support of the navigation; and to pay the interest of the money borrowed at five per cent, with officers' salaries, &c. &c.: and it was further ordered that seven of the commissioners should be appointed to enter into an agreement with Mr. Chaplin to carry the order into execution.

\*A memorandum of this order or agreement was entered in the [\*269] proceedings of the commissioners; but no more formal agreement or lease was made; nor was any act of parliament obtained to confirm it. But under this order or agreement, Mr. Chaplin was put into receipt of the tolls; and he and his representatives had ever since been in the receipt of them.

The bill was filed by two shareholders of the navigation, on behalf of themselves and all the other shareholders except the defendants. The defendants were all the acting commissioners under the act, and the personal representatives of Mr. Charles Chaplin, one of whom happened to be also a commissioner. It alleged that the income of the tolls greatly exceeded all the payments which were to be made under the agreement; and contended that the surplus ought to have been applied in discharging the principal sums which had been lent to the commissioners, whereby the tolls would have been reduced, and the public might have had the benefit of the canal, either without toll, or at more reasonable and reduced rate; instead of their being kept up, as they had been, at the highest rate allowed by the act: and it prayed that the agreement might be declared to be void as an absolute assignment, and to stand as a security only for payment of the interest of the 100*l.* shares, and the expenses of the canal, and then of the principal of the shares: that an account might be taken of the tolls received by Mr. Chaplin and his representatives, and of the sums expended by them in paying the interest of the shares, and repairing the canal; and that the balance might be paid over to a

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 1825.—Gray v. Chaplin.
 

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person to be appointed by the court ; and that a receiver might be appointed to collect the tolls.

[\*270] \*To this bill a general demurrer was filed by Mr. W. Chaplin, who was made a defendant as one of the acting commissioners.

Mr. Fane, in support of the demurrer :—

1. The plaintiffs are not competent to sustain a suit in the form adopted ; for they and the other persons on whose behalf the suit is instituted have not a common interest. The bill states that an arrangement was made with Mr. Chaplin in the year 1777, by which the shareholders became entitled to receive interest at 5*l.* per cent upon each 100*l.* share. If every shareholder were to take his shares into the market, he would be able to obtain 100*l.* for each share. If the plaintiffs succeed, he would not be able to get more ; and, therefore, this suit cannot be advantageous to the other shareholders on whose behalf it is instituted.

2. This agreement was originally a fair one, and binding on all the persons who were parties to it. These plaintiffs were, in fact, parties to the agreement, because they are holders of shares which were then in existence. As they do not state that they claim under any one of the three shareholders who opposed the entering into the agreement, it is fair to infer that they claim under some of those who assented to it. But, if they had not claimed under those who were originally parties to this agreement, they are bound by acquiescence, and are not now at liberty to say they will get rid of the agreement. There is no pretence throughout the bill that the facts on which they found their claim have come lately to their knowledge ; and, if that were the case, they are bound by the knowledge of the persons under whom they claim.

[\*271] \*3. Suppose these plaintiffs are entitled to sue, their rights ought to be enforced at law. The commissioners act under public authority ; and the proper mode to compel them to do their duty is by mandamus.

Mr. Hart, Mr. Sugden, and Mr. Roupell, in support of the bill :—The commissioners had no authority to demise these tolls for a longer term than seven years. There is no provision in this agreement for paying off the principal of the sums borrowed ; but the rent reserved is only sufficient to pay interest upon the sums due at 5*l.* per cent. The bill is founded on the right of the plaintiffs to have the trusts of the act carried into execution, and they have a right to use the names of the other shareholders for that purpose ; for it is not in their power to say that they are content with the commissioners being guilty of a breach of duty. The fair inference is that every one of the shareholders is interested in having the trusts performed. This agreement is not a beneficial one to the shareholders ; for if capital were locked up for half a century, it might now produce more than 5*l.* per cent. Besides, considering the various events that may take place in that time, who can tell that the value of money may not be greatly increased. Several of the commissioners are stated to have entered into the agreement ; but it is not said that any of them

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executed it except the two mentioned in the bill. The commissioners are merely individuals named in the act. If they decline to execute the trusts, the remedy must be in equity. A mandamus would not be effectual; for it could not compel the taking of the accounts, or the carrying of the trusts into execution. The bill does not impose on the other \*share- [\*272] holders the necessity of taking the benefit of the suit. They are at liberty to come in and take the benefit of the decree, or not, as they think proper. In a creditor's suit, some of them might wish to have the administration of the assets delayed, but the court would not listen to any application of that nature. By the memorandum it appears that the parties were conscious that they were doing an illegal act; for it contains a stipulation for an application to parliament to confirm the agreement. No such application was ever made. Acts of parliament of this nature are considered as a species of contract between the public and the undertakers of the work. *Attorney-General v. Brown.*(a)

The VICE-CHANCELLOR :—In order to enable a plaintiff to sue on behalf of himself and all others who stand in the same relation with him to the subject of the suit, it must appear that the relief sought by him is in its nature beneficial to all those whom he undertakes to represent.[1] The several persons who advanced moneys upon the credit of these tolls, must be taken to have advanced such moneys in the confidence that the powers of management of the tolls, which were vested in the commissioners, would be duly exercised according to the directions of the act; and a bill which has for its object the due exercise of those powers and to avoid a breach of trust, must be intended to be in its nature beneficial to every shareholder. I am of opinion, therefore, that the plaintiffs were entitled to file this bill on behalf of themselves and all other the shareholders who were not defendants.[2]

\*It is next argued that the plaintiffs are not entitled to object to this [\*273] agreement, because the persons who at the time of the agreement were possessed of the shares which they now hold, were parties to this agreement. This fact does not appear upon the bill. The only reference to it is by recital in the agreement; and the recital in the agreement, if it were precise, is not equivalent to an averment of the fact. But the recital does not import that all the shareholders, except the three persons named, were parties to the agreement. It states that Mr. Chaplin's proposal had been accepted and approved by the greatest part of the subscribers present at the meeting, and had since

(a) 1 Swan, 265.

[1] Vide *Bainbridge v. Burton*, 2 Beav. 539. *Jones v. Garcia del Rio*, Turn. & Russ. 297. *Bromley v. Smith*, 1 Sim. 8.

[2] Vide *Baldwin v. Lawrence*, ante, 18, 26, and note, *ibid.* *Walker v. Devereaux and others*, 4 Paige, 229. *Hichens and others v. Congreve and others*, 4 Russ. 562. The plaintiff in such a bill must show how he derived his title, or it is demurrable. *Walburn v. Ingilby*, 1 Mylne & Keene, 61. Whether it will lie for the purpose of procuring a dissolution of the company. *Quero, Van Sandan v. Moore and others*, 1 Russ. 441.

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been accepted and approved of by all other the subscribers. This may well mean all other the subscribers not present at the meeting. The agreement in question would not, however, have been warranted if every shareholder had been an actual party to it; because it is not alone the interest of the shareholders, but the interest of the public which is affected by it. This agreement renders all reduction of the rate of the tolls, as well as all reduction of the debt, impossible for a term of ninety-nine years, whatever may be the produce of the tolls; whereas the act of parliament requires that the rate of the tolls should be reduced whenever the state of the debt will admit of it.

Demurrer overruled.[1]

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\*THRING V. EDGAR.

1825, 15th April; 1st June.—*Pleading.—Negative plea.—Plea and answer.*

To a creditor's bill the defendant pleaded that the deceased was not indebted to the plaintiff at her death, and accompanied the plea by an answer denying the existence of the debt, and the manner in which it was alleged to have been contracted; held that the answer overruled the plea. An answer to a negative plea must be confined to facts specially charged as evidence of the plaintiff's title.

THIS was a bill, filed by a creditor of Martha Butt deceased, against her heir at law, devisees and executors for an account and payment of the plaintiff's debt.

The defendant Edgar, one of the devisees and executors, put in the following plea and answer:—"To all the discovery and relief sought from or prayed against this defendant, other than and except so much of the said bill as seeks a discovery whether Martha Butt, the testatrix in the said bill of complaint named, was not, in her lifetime and at the time of her death, indebted unto the said complainant in the sum of 215*l.* and upwards, or some other and what sum, for goods sold, and money lent, paid out and advanced by him to the said testatrix to and for her use, and by her order, and on her account, in her lifetime, or in and by some and what manner and means, and whether the same debt, or part and how much thereof, and whether or not with some arrear of interest thereon or upon some part thereof, doth not now remain and is not due and owing to the said complainant from the said testatrix's estate, and as requires this defendant to set forth a list and schedule of all books of account, accounts, receipts, vouchers, deeds, evidences, papers and writings of or concerning or relating to the hereinbefore mentioned matters and things, or any or either of them, or any parts or part thereof, which are, or

[\*275] at any time or times were in the possession or power of this defendant, and Thomas Dowding and Elizabeth Dowding, two other defen-

[1] S. C. Russ. 126. Where the Vice-Chancellor having made an order for a receiver, the order was discharged by the Lord Chancellor.

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dants to the said bill of complaint, or any or either and which of them, or any person or persons for or on account or on behalf of this defendant, and the said two other defendants, or any or either and which of them: and in such list or schedule to particularize and distinguish which of the several books of account, accounts, receipts, vouchers, deeds, evidences, papers and writings are now in the possession or power of this defendant, and the said two other defendants, or any or either and which of them, or any and what person or persons for or on the account or behalf of this defendant, and the said two other defendants, or any or either and which of them, and to account for the residue of the said several books of account, accounts, receipts, vouchers, deeds, evidences, papers and writings, and set forth what is become thereof, and where and in whose possession, and for whom, and for whose account and behalf the same respectively now are, and why, when, where and to whom and for what this defendant and the said two other defendants, or any or either and which of them, last parted therewith respectively, this defendant doth plead in bar, and for plea saith that the said Martha Butt was not, at the time of her death, indebted unto the said complainant in the sum of 215*l.* and upwards, or in any other sum of money whatever. All which matters and things this defendant doth aver to be true, and is ready to prove as this honorable court shall award; and he doth plead the same in bar to the whole of the said bill, except such parts as aforesaid; and doth humbly demand the judgment of this honorable court, whether this defendant ought to be \*compelled to [\*276] make any further or other answer to such parts of the said bill as he hath pleaded unto, and prays to be dismissed in respect thereof, with his costs and charges in this behalf sustained. And this defendant not waiving the benefit of his said plea, but wholly relying and insisting thereon, and in aid and support thereof, for answer to the remainder of the said complainant's bill not hereinbefore pleaded unto, or unto so much thereof as this defendant is advised it is in anywise material or necessary for him to make answer unto, answereth and saith that the said Martha Butt was not, in her lifetime or at the time of her death, to the knowledge or belief of this defendant, indebted unto the said complainant in the sum of 215*l.* and upwards or any other sum, for goods sold and money lent, paid, laid out and advanced by him to the said Martha Butt to and for her use, and by her order, and on her account, in her lifetime, or in or by any manner or means; and that this defendant hath not, nor ever had, nor have, or hath, or ever had the said two other defendants, Thomas Dowding and Elizabeth Dowding, or either of them, to the knowledge or belief of this defendant, nor hath, or have, or ever had any person or persons for or on the account or behalf of this defendant, or (to his knowledge or belief) of the said two other defendants, or either of them, any books of account, accounts, receipts, vouchers, deeds, evidences, papers, or writings, of or concerning or relating to the matters and things aforesaid, or any or either of them, or any parts or part thereof. And this defendant denies all, and all manner of combination without this, that, &c."

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This plea now came on to be argued.

[\*277] Mr. *Lovatt*, for the plea, insisted that it was not \*enough that the plea should deny that any debt existed, but that it was necessary to accompany it by an answer as to the particular manner in which the bill alleged that the debt was contracted; and that, inasmuch as the bill charged that the defendants were in possession of books and papers from which the truth of the matters stated would appear (which included the statement as to the debt) it was necessary also to answer as to the fact, whether the defendant had or not any such books or papers.

Mr. *Knight*, for the bill.

The VICE-CHANCELLOR:—In the case of *Sanders v. King*, which came before me in May 1821, I had occasion very fully to consider the form and principle of pleading upon a negative plea. It has happened that this case has not been reported.[1] But I have a correct note of my judgment, which embraces all the material facts of the case, and I will now read it. [Here the Vice-Chancellor read the judgment in *Sanders v. King*, which was as follows.]

2d May, 1821.—“This is a bill for an account of the dealings and transactions of a partnership, in which the defendant King is alleged to have been concerned; and the defendant King has, to the whole of the discovery, pleaded that he was no partner.

“Upon this plea the issue between the parties is, whether a partnership did or not exist; and the plaintiff objects that, although the defendant does [\*278] by his \*plea affirm, upon his oath, that there was no partnership, yet he is not thereby to deprive the plaintiff of that right to a discovery which the principles of a court of equity give to every suitor as to the matter in issue between the parties; and that, notwithstanding his plea, the defendant is therefore bound to answer to all facts and circumstances which are stated in the bill as affording evidence to disprove the truth of the plea.

“It is very singular that this question does not appear ever to have distinctly arisen before.

“In the case of *Drew v. Drew*,(a) Sir Thomas Plumer decided, generally, that a plea of no partner was a good plea; but the present point was not taken.

“It is stated by Lord Redesdale, p. 244, in the last edition of his Treatise, as the result of several authorities, that, if a plea in bar be disproved at the hearing, the plaintiff is not to lose the benefit of his discovery; but the court orders the defendant to be examined upon interrogatories to supply the defect.

“This necessarily refers to discovery as to the other matters of the suit, and not as to the truth of the plea, which is already disposed of; but marks the care of the court to maintain for the plaintiff that advantage of discovery which is the peculiar province of a court of equity.

(a) 2 V. & B. 159.

[1] It has since been discovered that this case is reported, 6 Madd. 61.

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"The discovery which a court of equity gives is, not the mere oath of the party to a general fact, as \*partnership or no partnership, but [\*270] an answer upon oath to every collateral circumstance charged as evidence of the general fact.

"Where the defendant, therefore, pleads the general fact as a bar to the whole discovery as well as relief, either the plaintiff, in the particular case, must lose the equitable privilege of discovery as to the circumstances which he has charged as evidence of the fact, or some special rule must be adopted, by analogy, in order to preserve to him that privilege.

"If a plaintiff comes into equity to avoid a legal bar, upon the ground of some alleged equitable circumstances, as in a case of a release, the defendant is not permitted to avail himself of his legal defence, so as to exclude the plaintiff from a discovery as to the alleged equitable circumstances. He may, indeed, plead his release; but he must in his plea generally deny the equity charged in the bill, and must also accompany his plea with a distinct answer and discovery as to every equitable circumstance alleged.

"In such a case the issue tendered by his plea is not the fact of his release, for that fact is admitted by the bill, but the issue is upon the equitable matter charged. Yet, inasmuch as the principles of a court of equity entitle the plaintiff to a discovery from the defendant upon the matter in issue, here we find that, notwithstanding the defendant pledges his oath that there is no truth in the equitable matter charged, he is nevertheless compelled to accompany his plea by an answer and discovery as to every circumstance alleged as evidence of the equity.

"\*This practice seems to afford a very strong analogy for the pre- [\*280] sent purpose. There the defendant affirms upon his oath that there is no equitable matter to destroy the legal bar of the release, yet he is nevertheless bound to accompany his plea with an answer and discovery as to every circumstance charged as evidence of that equity.[1] Here the defendant affirms upon his oath that there is no partnership; and, by analogy, it seems to follow that he is nevertheless bound to accompany his plea with an answer and discovery as to every circumstance charged as evidence of the partnership.

"Adopting, therefore, this analogy for the present purpose, it furnishes this rule, that a plea which negatives the plaintiff's title, though it protects a defendant generally from answer and discovery as to the subject of the suit, does not protect him from answer and discovery as to such matters as are specially charged as evidence of the plaintiff's title.[1]

"According to this rule this plea, not being accompanied by an answer and discovery as to the circumstances specially charged as evidence of the partnership, must be overruled; but, being a new case, the defendant must be at liberty to amend his plea."

[1] Vide *James v. Sadgrove*, 1 Sim. & Stu. 6. *Foley v. Hill*, 3 Myln. & Cr. 475.

[2] Vide *Bogardus v. Trinity Church*, 4 Paige, 176.



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To apply these principles to the present case. If the testatrix were not at her death indebted to the plaintiff in any sum of money, then the plaintiff's title to any relief, or any discovery upon this bill, wholly fails, and the plea of no debt is a full bar to the whole suit; unless the plaintiff has sought from the defendant a discovery of any circumstances by which the [\*281] existence of the alleged debt is to be established; and then the defendant, although by his plea he may deny the debt, must still answer as to the particular discovery which is thus sought from him. But, in order that a defendant may in such a case know what is the particular discovery which the plaintiff requires from him, it is incumbent upon the plaintiff distinctly to state it in the bill; and the common form of doing this is, by the plaintiff's charging, as evidence of his title, the particular matters as to which he seeks a discovery from the defendant. Unless the defendant is distinctly informed by the plaintiff what are the particular matters affecting his title, as to which he seeks such discovery, the defendant, not knowing what he is expected to answer, is not to answer at all.

The plaintiff in the present bill gives no distinct information to the defendant that he seeks any discovery from him, for the purpose of establishing the existence of the debt. The defendant's plea therefore of no debt, was a full bar to the whole discovery, as well as to the relief; and the defendant as much overruled his plea by answering to the debt, as he would have overruled it by answering to any other part of the bill.

If, upon the filing of this plea, the plaintiff had desired a particular discovery from the defendant as to any circumstances by which the debt was to be established, he would have amended his bill, and would have charged, as evidence of his title, the special matters which he required to be answered.

Plea overruled.(b)

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\*PENNINGTON v. BEECHEY.

1825, 15th April.—*Pleading.*

In a plea of purchase for valuable consideration without notice, it is enough to deny notice generally in the plea; unless facts are specially charged in the bill as evidence of notice.

THE bill was filed for a discovery in aid of an ejectment, which the plaintiff had brought against the defendant, to recover possession of an estate. It alleged that the plaintiff was entitled to the estate under a settlement, made upon the marriage of his great-grandfather in 1717; and that the defendant had fre-

(b) See the next case. [Vide *Bolton v. Gardner*, 3 Paige, 273; *Watkins v. Stone*, post, 560; *Story Eq. Plead.* 495, 516, 517, 526; *Hardman v. Ellames*, 2 Mylne & Keene, 732; *Denys v. Lecock*, 3 Myl. & Cr. 205. In the last case, that in the text is criticized, and the Chancellor comes to the conclusion that it would have been decided otherwise had the Vice-Chancellor been aware of certain facts which he appears to have overlooked.]

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quently admitted to the plaintiff's father that he held the estate during the life only of the plaintiff's father, and that at his death the plaintiff would succeed to it.

\* The defendant pleaded a conveyance of the estate, made to him in 1795, by a person then in the actual possession of it and who alleged himself to be seised in fee, for 600*l.*; and averred that he had not, at or before the time of the execution of the conveyance or the payment of the 600*l.*, any notice whatsoever of any right, title or interest of the complainant in or to the premises, or any part thereof.

The plea now came on to be argued.

*Mr. Temple*, for the plea.

*Mr. J. Martin*, for the bill, objected that the plea ought expressly to have denied notice of the settlement of 1717, under which the plaintiff claimed; and that it ought to have been accompanied with an answer as to the alleged admissions of the plaintiff's title, made by the defendant to the plaintiff's father.

\*The VICE-CHANCELLOR:—The plaintiff insists that notice of the [\*283] settlement of 1717 would have been constructive notice of the plaintiff's title: but it does not follow that the plea therefore ought specially to have denied notice of that settlement. The general denial by the plea of all notice whatsoever, includes constructive as well as actual notice, and is therefore a denial of notice of the settlement. It is not the office of a plea to deny particular facts of notice, even if such particular facts are charged. Here the plaintiff, not anticipating, by the bill, the defence of the defendant as a purchaser for a valuable consideration, has not charged that the defendant had notice of this settlement, or any notice of his title.

If the plaintiff had meant to have affected the defendant with notice of this settlement, he should have charged generally, in his bill, that the defendant had notice of his title; and then, as evidence thereof, should have specially charged notice of the settlement. In such case the defendant, notwithstanding the general denial of notice in the plea, would have been bound to answer as to the special notice of the settlement.

With respect to the objection, that the plea ought to have been accompanied with an answer as to the admission of the plaintiff's title, alleged to have been made by the defendant, because such admissions would have been evidence that the defendant had notice of the plaintiff's title, the answer is that the plaintiff has not made that case in his bill. For such a purpose also the plaintiff, after generally charging that the defendant had notice of his title, should, as evidence thereof, have \*specially charged these ad- [\*284] missions, which the defendant would then have been bound to answer, notwithstanding the general denial of notice in the plea.

Plea allowed. (a)

(a) See preceding case. [Vide *Story's Eq. Plead.* 526.]

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 1825.—*Logan v. Fairlie.*


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## LOGAN v. FAIRLIE.

1825, 18th April.—*Legacy-duty.—Administration.—Parties.*

A testator resident in India, and having all his property there, bequeathed his residuary estate to H. L. but if she should die before him, then to her children. H. L. died before the testator, and the executor, who was also resident in India, proved the will there, and remitted the residue to his agent in England, with directions to pay it to H. L. or her children. A suit having been instituted by the children, who were infants, against the executor and his agents to have the residue secured: Held that the legacy-duty was payable upon it, and that administration to the testator ought to have been taken out in this country, and the administrator made a party to the suit.

Where a testator dies in India, leaving personal estate there only, and his executors reside and prove his will there, no duty is payable on a legacy remitted to a legatee in England.

JOHN HOME, a major in the service of the East India Company, bequeathed the residue of his estate and effects, both real and personal, to his brother, the defendant, James Home, of Broom House, in the county of Berwick-upon-Tweed, and his sister, Helen Logan, of Tweed Hall, in the same county, in equal shares, if they should be living at his decease; but, in case his sister should die before him, leaving children, he desired that her children should have the share that she would have been entitled to if living, share and share alike: and he appointed the defendants, Fairlie and Clark, both of whom were resident in India, executors of his will.

The testator died in India, leaving no property in Great Britain; and Clark proved his will in Calcutta. James Home survived the testator; but Mrs.

Logan died in his lifetime, leaving nine infant children surviving [\*285] \*her. In 1819, Clark remitted 7,000*l.*, part of the testator's residuary estate, to Fairlie, Bonham & Co. his agents in this country, with directions to pay one moiety of it to James Home, and the other, to Mrs. Logan, or her children. Fairlie, Bonham & Co. without making any deduction for legacy duty, paid over one moiety of the 7,000*l.* to James Home, the testator's brother, but refused to part with the other moiety; upon which this suit was instituted by Mrs. Logan's children, against Fairlie, Bonham & Co. and also against Clark and James Home (both of whom were charged to be out of the jurisdiction of the court) for the purpose of having that moiety secured for the benefit of the plaintiffs. Under an order in the cause, the moiety in question had been paid into court, and invested in stock. By the decree inquiries were directed to ascertain whether Mrs. Logan was dead, and what children she left at her decease; and liberty was given to Fairlie, Bonham & Co. to apply to the court in case they should be drawn upon from India for the moiety.

By the decree on further directions, the stock was carried over, in ninth, to the separate accounts of the plaintiffs. The eldest of them, on coming of age, had obtained an order for payment of his share: but the accountant-general declined to comply with the order unless a receipt for the legacy-duty was produced to him. The duty was accordingly paid, but upon an understanding

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that it should be refunded in case the court should be of opinion that it did not attach. Another of the plaintiffs having come of age, petitioned for a transfer of her share.(a)

\*On the hearing of this petition the only question was, whether the [\*286] duty was payable upon this share?

Mr. *Pemberton*, for the petitioner:—The legacy-duty is not payable, unless there is a personal representative of the deceased in England; and the mere remitting of the fund to England does not make it liable to the duty. The stamp-office admits that the duty does not attach when a power of attorney to receive a legacy is sent abroad; but that it does, if the legacy is remitted to this country; so that an infant entitled to a legacy must pay the duty, when an adult would not, because the latter could execute a power of attorney, and the former could not. It is plainly contrary to reason and justice that this should be the case, and, therefore, it is impossible that the legislature should have intended it. The 36 Geo. 3, c. 52, first repeals the duties imposed by former acts, and then imposes new duties; and directs that such new duties shall be under the care, management and direction of the commissioners for the time being appointed to manage the duties on stamped vellum, parchment and paper.(b) This shows that the act relates only to funds in England. It is clear, from \*the sixth section,(c) that the person who is to pay is the executor or [\*287]

(a) The above statement is taken from the petition. It appeared, however, by the answer, that, when Clark remitted the 7,000*l.* to his agents, he sent them a copy of the residuary clause of the will, and desired them to appropriate the fund accordingly, adding that they would perceive, by the clause, that half of the fund went to J. Home, and half to Mrs. Logan, or her children.

(b) See sections 1, 2, & 3.

(c) This section is as follows:—“And be it further enacted, that the duties hereby imposed shall, in all cases in which it is not hereby otherwise provided, be accounted for, answered, and paid, by the person or persons having or taking the burthen of the execution of the will or other testamentary instrument, or the administration of the personal estate of any person deceased, upon retainer for his, her, or their own benefit, or for the benefit of any other person or persons, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, which he, she, or they shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons; and also upon delivery, payment, or other satisfaction or discharge whatsoever of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, to which any other person or persons shall be entitled; and in case any person or persons having or taking the burthen of such execution or administration as aforesaid, shall retain for his, her, or their own benefit, or for the benefit of any other person or persons, any legacy, or any part of any legacy, or the residue of any personal estate, or any part of such residue, which such person or persons shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons, and upon which any duty shall be chargeable by virtue of this act, not having first paid such duty, or shall deliver, pay, or otherwise howsoever satisfy or discharge any legacy, or any part of any legacy, or the residue of any personal estate, or any part thereof, to which any other person or persons shall be entitled, and upon which any duty shall be chargeable by virtue of this act, having received or deducted the duty so chargeable, then and in every of such cases, the duty which shall be due and payable upon every such legacy, and part of legacy and residue, and part of residue respectively, and which shall not have been duly paid and satisfied to his majesty, his heirs and successors, according to the provisions of this act, shall be a debt of such person or persons having or taking the burthen of such execution or administration as

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administrator. This clause applies only to an executor proving a will [\*288] in England; for \*it would be absurd that the representative of a person dying in a foreign country, and leaving property there only, should be compelled to pay a duty in England. It is clear that the duty does not attach where the legacy is only paid in England.

The 48 Geo. 3, c. 149, sect. 44, enables the commissioners to stamp a receipt for a legacy which has been signed out of Great Britain. So that, if the crown is right in contending that the duty is payable notwithstanding the property is administered abroad, and as by this section it is due where the legacy is paid abroad, it follows that, if the executor comes to Eng- [\*289] land he is not only liable to pay the duty, but to all \*the penalties imposed by the acts of parliament relating to the payment of legacies. It is impossible that the legislature could have intended this.

The cases which have been decided upon this subject, are authorities to show that the duty is not payable in this instance. In *The Attorney-General v. Cockerell*,(d) the counsel for the crown put their claim upon a ground which clearly shows that the duty is not payable in this case; and the decision was founded on the circumstances of the will being proved in this country, and the money in the hands of the executor being assets for payment of debts in this country. The only other case is, *The Attorney-General v. Bealson*,(e) in which there was the same decision on the same ground. In both these cases the will was proved in England, a circumstance which is wanting here. This property was not administered in England; nor was its assets in England. There can be no doubt that the payment into court under the decree, was payment to the legatees. *Hill v. Atkinson*.(f) This money was remitted by the executor to his agents, and was therefore liable to be recalled; and there is a provision in the decree, that the agents may apply to the court to have it repaid; now can it be contended that it was intended to subject the legacy to the duty by adopting the payment?

Mr. *Wakefield*, for the defendant Fairlie and his partners:—The [\*290] rule by which the question in this case must be \*decided is, that if the executor acts under the authority of a court in this country, the duty does attach; if he does not, the duty does not attach.

Mr. *Boteler*, for the crown:—This case does not differ from *The Attorney-General v. Cockerell*. It has been taken for granted that there was no admi-

aforesaid, to his majesty, his heirs and successors; and in case any such person or persons so having or taking the burthen of such execution or administration aforesaid, shall deliver, pay, or otherwise howsoever satisfy or discharge any such legacy or residue, or any part of any such legacy or residue to or for the benefit of any person or persons entitled thereto, without having received or deducted the duty chargeable thereon, (such duty not having been first duly paid to his majesty, his heirs or successors, according to the provisions herein contained,) then and in every such case such duty shall be a debt to his majesty, his heirs and successors, both of the person or persons who shall make such delivery, payment, satisfaction, or discharge, and of the person or persons to whom the same shall be made."

(d) 1 Pri. 165.

(e) 7 Pri. 560.

(f) 3 Pri. 399.

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nistration of the property in this country ; but there was an act of administration in this country. If this suit is rightly framed, it is clear that the crown cannot have any claim to the duty. But the question is, whether this suit is rightly framed, and whether administration ought not, regularly, to have been taken out in this country before this suit was instituted.

Mr. *Pemberton*, in reply :—Here the property was not administered in England, but was remitted for the payment of a particular legacy. It was appropriated in India to the payment of a legacy in England, which is the same as if the legacy had been actually paid in India.

The VICE-CHANCELLOR :—This question, strictly speaking, is not cognizable by this court. The court of exchequer alone has jurisdiction to decide it : and, if my opinion was unfavorable to the claim of the crown, I should give the attorney-general the opportunity of taking the judgment of the court of exchequer upon it. For the same reason I now propose to the petitioner, if he is dissatisfied with my opinion that the legacy-duty is payable, to put this matter in such a course that he may \*obtain the judgment of [\*291] the court of exchequer upon the point.

If a testator die in India, and his personal estate be wholly in India, and his executor be resident there, and the will be proved there, and the executor remit to a legatee in England, or to some other person in England, for the specific use of the legatee, the amount of his legacy, I am of opinion that the legacy duty is not payable upon such remittance, inasmuch as the whole estate is administered in India, and the remittance is in respect of a demand which is to be considered as established there.[1] But if a part of the assets of the testator is found in England, in the hands of the agent of such executor, without any specific appropriation, and a legatee in England institute a suit here for the payment of his legacy out of such unappropriated assets, then such assets are to be considered as administered in England, and the legacy-duty is payable in respect of them. Now that is the case here. The sum in question was remitted by the executor in India to the defendants, for the purpose of being paid to Helen Logan, the residuary legatee ; and, if Helen Logan had been the residuary legatee, and the payment had been made to her accordingly, the legacy-duty would not, upon my principle, have been payable here. But Helen Logan had died in the lifetime of the testator, and the gift of the residue to her had lapsed, and her children, the plaintiffs, were the residuary legatees ; and their bill was filed, not upon the ground of a specific appropriation of this sum to them by the executor, for no such appropriation had been made, but upon the ground of their title under the will as residuary legatees, and because the sum in question was admitted to be part of the testator's \*residuary estate. This sum, therefore, was [\*292] estate of the testator administered here, and the legacy duty is, for that reason, payable.[2]

[1] Vide *Huy v. Fairlie*, 1 Russ. 117.

[2] But on a subsequent application, in 1835, by another party in interest, the legacy was di-

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 1825.—*Nelson v. The London Assurance Company.*


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It must be observed, however, that this suit has proceeded irregularly. This court cannot administer any personal estate without having the personal representative before it; and this suit is defective throughout for want of such personal representative, though the objection occurs now too late to be corrected.[3]

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### NELSON V. THE LONDON ASSURANCE COMPANY.

1825, 22d April.—*Lien.—Bankrupt.—Set-off.*

The directors of a company assigned their salaries and shares to the company to secure debts due from them on their private accounts, and empowered the company to direct the treasurer to retain their salaries and dividends, and sell their shares, for payment of their debts. One of the directors became bankrupt, but the power given to the company had not been exercised, and his shares still remained in his name; Held, that they passed to his assignees as being in his order and disposition, but that the company had a right to set off, against the bankrupt's debt, the dividends and salary due to him at his bankruptcy.

ANDREW TIMBRELL having purchased eighty shares in the capital of The London Assurance Corporation, they were transferred into his name, and assigned to him in the manner prescribed by the charter, and he was elected a director of the body.

A deed, bearing date the 8th of July 1819, was made between the corpo-

rected to be paid, discharged of the duty: thus overruling the case in the text. *Logan v. Fairlie*, 1 Mylne & Craig, 59. Where the will had also been proved in England, and the executor in India remitted the fund to the executors in England to be appropriated according to the will, it was held that the duty was not payable: it was unnecessary that the executor in India should pass the money through the hands of the executors in England. *Arnold v. Arnold*, 2 Mylne & Craig, 256.

[3] To a bill which seeks, for an account of the assets of an intestate who died in India, possessed by a personal representative there, a personal representative of the intestate constituted in England, is a necessary party, although it does not appear that the intestate at the time of her death had any assets in England: and it is not sufficient, in order to avoid a demurrer for want of parties in such a case, that the personal representative constituted in India, who is out of the jurisdiction, is made a party, and that process is prayed against her when within the jurisdiction; although the bill alleges that the India court was the proper court for granting administration, and that the administratrix constituted by it, is the sole legal personal representative of the intestate. *Tyler v. Bell*, 2 Mylne & Craig, 89. The court of chancery has jurisdiction to compel a foreign executor or administrator to account for the trust funds which he received abroad, and brought with him into this state; and that too without taking out letters of administration on the estate of the decedent here: but the assets must be applied in the payment of debts, to be distributed among the next of kin according to the law of the country from which his authority was derived, and which would be applicable to the case if he had been called to account there. *McNamara and wife v. Dwyer and others*, 7 Paige, 239. Where the executor who had proved the will in India, and having afterwards come to England, was made a party to a suit for the administration of the testator's estate; it was held that it was not necessary that an administrator of his estate in England should be a party to this suit. *Anderson v. Caunter*, 3 Mylne & Keene, 763. This case is criticized by Lord Cottenham in 2 Mylne & Craig, 110, who considers it difficult to reconcile it with what had been said by the same judge in the case in the text.

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 1825.—Nelson v. The London Assurance Company.
 

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ration of the one part, and the governor, sub-governor, deputy-governor and directors of the other part; whereby, after reciting that the governor, \*sub-governor, deputy governor and directors, being merchants, transacted business with the corporation in their separate and private capacities, and that it was usual for the corporation to give credit to persons who transacted business with them; and, lest it might be doubtful whether the stock of the governors and directors, to each of them separately belonging, were liable to the payment of the debts which might be owing to the corporation from them, respectively, or jointly, in their private and separate capacities, for obviating such doubts, and for better securing to the corporation all such sums of money as the governors and directors, or any of them, in their private capacities, either alone or jointly with any other person or persons, did or might, at any time during their continuance in the direction, owe or stand indebted to the corporation, the governor, sub-governor, deputy-governor and directors did separately covenant and agree with the corporation, that the salary of each of them, and also their and each of their stock, share, and interest in the capital stock of the corporation, and all dividends due and to grow due thereon, should be subject and liable to the payment of all such sums of money: and a committee of treasury for the time being of the corporation were thereby authorized and empowered to stop and retain the respective salaries, and dividends in the respective stock of such governor, sub-governor, deputy-governor and directors for those purposes, and to sell and dispose of such stock, or so much thereof as should be necessary, when and as the court of directors should think fit, and to apply the said salary and dividends, and the money arising from such sales, towards satisfaction, and payment of such debts and sums of money, rendering the overplus (if any) to the proprietors of such \*stock or shares: and the parties [\*293] thereto of the second part appointed the accountant of the corporation their attorney for the purposes of such sales as should be authorized and directed by any order or resolution of the court of directors, and to receive the money arising thereby, and to apply the same in the manner thereby directed and agreed: and, further, it was thereby agreed that, until there should be some order or resolution of the court of directors to the contrary, it should be lawful for each of those persons to receive their respective salaries, and the dividends upon their stock or shares, and to sell and transfer their stock and shares. [\*294]

In February 1821, a commission of bankrupt issued against Timbrell; and the plaintiffs were appointed his assignees. At the time of the bankruptcy, Timbrell was indebted to the corporation in 852*l.* on a bond for securing premiums on certain insurances effected with the corporation. It did not appear that there had been any order made by the court of directors for stopping Timbrell's salary, or the dividends on his shares, or for selling those shares.

The plaintiffs insisted that they were entitled to be paid the arrears of salary and dividends due to the bankrupt, and to have his shares of the capital trans-



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 1825.—*Mason v. Robinson.*


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ferred to them, as being in his order and disposition at the time of his bankruptcy. The corporation claimed, under the deed of July 1819, a lien upon those arrears and shares in respect of the debt of 852*l*.

*Mr. Horne and Mr. Rose* for the plaintiffs.

*Mr. Heald, Mr. Roupell and Mr. Polson*, for the defendants.

[\*295] \*The VICE-CHANCELLOR:—The clause at the end of the deed of the 8th of July 1819, expressly provides that, until there shall be some order of the court of directors to the contrary, it shall be lawful for every director to receive his salary and dividends, and to sell and transfer his stock and shares. Previous to the bankruptcy of A. Timbrell there had been no such order of the court of directors, and, at the time of his bankruptcy, therefore, such stock and shares were in his order and disposition, and passed under the commission to his assignees. In respect of the moneys which were due at the bankruptcy for dividends and salary, the corporation have a right of set-off; and the decree must be for transfer of the shares only, and for dividends subsequent to the bankruptcy.

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#### MASON v. ROBINSON.

1825, 25th April.—*Will.—Construction.*

To avoid a will for uncertainty, it is not enough that the dispositions in it are so absurd and irrational that it is difficult to believe they could have been intended by the testator, but it must be incapable of any clear meaning.

JOHN DIXON, after devising his real estate to trustees, their heirs and assigns, proceeded as follows: "Upon trust to pay unto Ann, the widow of my son Ralph Dixon, one annuity or clear yearly sum of 10*l*. till her death or second marriage, which shall first happen, the said annuity to be payable half-yearly at Michaelmas and Ladyday, the first payment thereof to begin and be

[\*296] made at such of those days as shall happen \*next after my decease, clear of all land-tax and other outgoings; and, subject as aforesaid, upon trust to pay and apply the remainder of such rents and profits from time to time as they shall yearly accrue and be received, and all such rents and profits from the death or second marriage of the said A. Dixon, which shall first happen, for and towards the maintenance and education of my grandson John Dixon, son of the said Ralph Dixon, until he shall attain his age of twenty-one years; but in case he shall die before he attains that age, then, from his death, to pay and apply such rents and profits (or the whole thereof from the death or second marriage of the said A. Dixon as aforesaid) for and towards the maintenance and education of my grand-daughter Margaret Faith Dixon, the daughter of the said R. Dixon, deceased, until she shall attain her age of twenty-one years; and my will is, that the receipt of the person or persons who shall have for the time being the care of the persons of my said grand-

1825.—*Mason v. Robinson.*

children respectively, shall be a sufficient discharge to my trustees for the money so paid; and from and after my said grandson J. Dixon shall have attained his age of twenty-one years, or my said grand-daughter M. F. Dixon (surviving him as aforesaid) shall have attained her said age of twenty-one years, then upon trust that my said trustees, the survivor or survivors of them, or the heirs and assigns of such survivor, shall and do, out of the rents and profits of the premises hereby devised to them, pay unto my son, W. M. Dixon, an annuity or clear yearly sum of 20% during the term of his natural life, payable half-yearly, and tax free, at Michaelmas and Ladyday; the first payment thereof to begin and be made at such of those days as shall first happen next after my said grandson, J. Dixon, shall have attained his age of \*twenty-one years, or next after my said grand-daughter M. F. [\*297] Dixon (surviving her said brother as aforesaid) shall have attained her said age of twenty-one years; and, subject thereto, upon trust to pay and apply the remainder of such rents and profits unto the said Ann Dixon yearly during the natural life of the said William Dixon, or until her second marriage, which shall first happen; and, from and after the death of my said son William, then upon trust that my said trustees, and the survivor or survivors of them, and the heirs and assigns of such survivor, shall and do convey and assure all and every the said messuages, lands, hereditaments and premises (subject and charged as aforesaid) unto and to the use of my said grandson John Dixon, and the heirs of his body lawfully to be begotten; but if my said grandson John Dixon shall happen to die before the period aforesaid, without leaving lawful issue living at his death, then upon this further trust that my said trustees, or the survivors or survivor of them, or his or her heirs or assigns, shall and do pay the rents and profits of the said premises unto my said son William Dixon for and during the term of his natural life, first deducting thereout the said annuity of 10% for the said Ann Dixon, in case she shall then remain the widow of the said Ralph Dixon; and, from and after the death of the said William Dixon, then upon trust to convey the same, subject and charged as aforesaid, to and amongst all and every the child or children of the said William Dixon lawfully to be begotten, share and share alike, as tenants in common, and not as joint tenants; and, in default of such issue, upon trust to convey the same and every part thereof, subject as aforesaid, unto and to the use of the said Ann Dixon, her heirs and assigns for ever."

\*The testator died in 1785. Ann Dixon died in 1792. J. Dixon, [\*298] the grandson, died in 1804, having long before attained his age of twenty-one years. William Dixon, the son of the testator, died in 1820, and the children of William Dixon, at the time of filing the bill, were in the actual possession of the property. The only question in the cause was, whether, in the events which had happened, the children of William Dixon were well entitled to the estate according to the true construction of the will, or who otherwise was entitled thereto according to such construction, or whether the will was void for uncertainty.

1825.—Mason v. Robeson.

Mr. *Heald*, and Mr. *Wilson*, for the plaintiffs.

Mr. *Hart*, Mr. *Willis*, and Mr. *Rolfe*, for the defendants.

The VICE-CHANCELLOR :—It is not enough to avoid a will for uncertainty that the dispositions, which are plainly expressed, are so absurd and irrational that it is difficult to believe that they should have been the real intention of the testator. In order to avoid a will for uncertainty, it must be incapable of any clear meaning. It is difficult to believe that this testator, having given an annuity of 10*l.* to his daughter-in-law, A. Dixon, for her life or widowhood, and having given the residue of the rents and profits for the maintenance of his grandson, J. Dixon, until he attained twenty-one, could really have intended that, when J. Dixon attained twenty-one, his present interest should wholly cease, and A. Dixon should then take, not her annuity, but the whole rents and profits, and not for her life or widowhood, but during the life of the [\*299] testator's son, William, or her widowhood, and \*that the rents and profits should not return to John until the death of William, no provision being made of the rents and profits in case of Ann's second marriage. But these dispositions, however irrational and inconsistent with the general purposes of the will, are clearly expressed, and must prevail if there is no other objection. The testator, after giving the whole rents and profits to Ann Dixon during the life of the testator's son William, or her widowhood, then directs that, after the death of William, the trustees are to convey the estate to John Dixon and the heirs of his body; but if John Dixon should happen to die before the period assigned, without leaving issue at his death, then upon trust to pay the rents and profits to the testator's son William during his life deducting thereout the annuity of 10*l.* for A. Dixon in case she should not have contracted a second marriage; and, after the death of William, then to convey the estate, subject to Ann's annuity, to and amongst the children of William as tenants in common. Here it is impossible to find any clear meaning. After the death of William, the trustees are to convey to John and the heirs of his body; but if John be then dead without issue, then the trustees are to pay the rents to William for his life, that is, after the death of William they are to pay the rents to William so long as he shall live, and Ann also during the life of William is to receive the whole rent, that is to say so long as William shall live; after his death to receive, not the whole rents, but her original annuity of 10*l.* only. There was plainly some error or omission in copying this will from the rough draft, and, it being impossible to assign any clear meaning to the expressions which are now found in it, the will is void for uncertainty.

[\*300] \*The Vice-Chancellor afterwards allowed the parties to take a case for the opinion of a court of law upon the construction of the will.[1]

[1] See the case of a will so obscurely and inartificially drawn that the court would derive the intention of the testator from it no further than the appointment of an executrix and guardian for infant children. *Bayeaux v. Bayeaux and others*, 8 Paige, 333. See further, *Turner v. Frederick*, 5 Sim. 466. *Baker v. Newton*, 2 Beavan, 112.

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1825.—*Scott v. Livesey.*

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SCOTT v. LIVESEY.

1825, 26th April.—*Practice.*

Where exceptions will lie to a master's report, it must be regularly confirmed before any order can be made upon it.

THIS was a petition by a purchaser under a decree of the court, stating an order, by which it was referred to the master to inquire whether the plaintiff could make a good title to the premises in question; that the master, by his report, had certified that the plaintiff could make a good title to the premises in question, and praying that the master's report might be confirmed, and an order made for completing the purchase conformably thereto.

Mr. *Spence*, for the plaintiffs, objected that the master's report had not been regularly confirmed, and that therefore no order could be made upon the petition.

The Vice-Chancellor allowed the objection, stating that wherever, as here, exceptions would lie to the master's report, it must be regularly confirmed before any order could be made upon it.

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\*MONEY v. MACLEOD.

[\*301]

1825, 28th April.—*Account.*—*Public policy.*

Where the plaintiff filed his bill for an account of the captain's profits of a voyage to India in one of the company's ships, to a share of which the plaintiff was entitled under an agreement with the captain, and it was alleged by the captain's executors that the agreement was made in consideration of the plaintiff having procured for the captain the command of the ship, this court directed an issue to ascertain the consideration, reserving the question, whether such an agreement would or not be void.

THIS was a bill filed against Captain Macleod, and on his death revived against his executors, for an account of the profits of two voyages to India made by Captain Macleod in the East-India Company's ship called *The Walthamstow*.

Captain Macleod having been appointed captain of this ship, and Mr. John Hotson having been appointed the purser, the following written agreement was entered into between them and the plaintiff, bearing date the 1st February 1804.

"We, the undersigned, being about to perform a voyage to India in *The Walthamstow*, do severally and separately bind ourselves to one another, by an obligation of honor, to engage in one united concern for all the expenses and advantages attendant thereupon, and resulting from trade, purserage and passengers; and do agree that our proportions shall be as follows, viz: W. T. Money two-thirds, D. Macleod and J. Hotson one-third between them, equally to be divided: It is further understood that W. T. Money shall take out all or any part of his family in the said ship free of all charge whatsoever; and it is agreed that a due proportion of cash shall be provided, and that for any sur-

1825.—Money v. Macleod.

plusage over such proportion the party advancing it shall receive seven and a half per cent. from the concern ; and it is further agreed, that, if any difference of opinion should arise, the majority shall decide, and from their decision there shall be \*no appeal to any court of law ; but, in the event of death to one of the parties, should there arise a misunderstanding between the remaining two, such misunderstanding shall be finally settled by arbitration in the usual manner ; and, finally, the parties concerned pledge themselves to keep this engagement secret.

W. T. MONEY,  
D. MACLEOD,  
J. HOTSON."

In pursuance of this agreement the plaintiff, with his family, sailed to India in *The Walthamstow*. Various sums to a considerable amount were advanced by the plaintiff under this agreement, and various pecuniary transactions took place between the plaintiff and Captain Macleod upon the footing of this agreement, but the account had not been finally settled.

On the second voyage made by Captain Macleod to India in *The Walthamstow*, another agreement, nearly in the same terms, was entered into between the plaintiff and Captain Macleod and Mr. Hotson ; and various pecuniary transactions had taken place between the plaintiff and Captain Macleod upon the footing of this second agreement, but without any final settlement.

Captain Macleod, in his answer to the original bill, did not state any motive for entering into the first agreement ; but he stated that he entered into the second agreement at the request of Sir Robert Wigram, who was the principal owner of the ship, and had materially contributed to his appointment as captain.

[\*303] \*The executors of Captain Macleod, in their answer to the bill of revivor, stated that the plaintiff had procured the command of *The Walthamstow* for Captain Macleod, upon an engagement on the part of Captain Macleod that the plaintiff should share in the profits of the appointment according to the stipulations of the two written agreements, and they insisted that such agreements were therefore illegal and void, and that the plaintiff, being himself an officer in the service of the East-India Company (superintendent of marine at Bombay) was, by covenant and by the bye-laws of the East India Company, restricted from trading, and that the agreements were, therefore, also void, and against public policy.

Sir R. Wigram who was examined by the plaintiff as a witness, stated that Captain Macleod was named to the command of *The Walthamstow* chiefly on account of the respect he Sir R. Wigram had for him, and in consequence of the good opinion entertained of his conduct ; and that the plaintiff did not exert any influence with him, Sir R. Wigram, or, as he knew or believed, with any other person, otherwise than in common with other persons speaking very highly of the conduct and abilities of Captain Macleod ; and that, to his knowledge or belief, the plaintiff did not have, take or receive any gratuity, consi-

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1835.—*Money v. Macleod*.

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deration, benefit or advantage from Captain Macleod, or any other person, in consequence of having exerted any influence to procure for him the command of the ship.

The cause now came on to be heard.

Mr. *Hart*, and Mr. *R. Grant*, for the plaintiff:—The influence of the plaintiff in procuring the appointment for Mr. Macleod could not be the consideration \*for the agreement, because the appointment required [\*304] the sanction of the East-India Company; and the sanction of the appointment by the company always recites the recommendation by some individual of the person appointed to the command of a ship.

If the agreements be illegal, they must be so, either, 1st, by the bye-laws of the East-India Company; or, 2d, by the statute law; or, 3d, by the common law.

I. The words of the bye-law applying to the sale of the command of ships in the East-India Company's service, in operation at the time of these agreements, have no application to this case. That bye-law is expressly confined to the case of the directors of the company, and none of the parties were directors at the time the agreements were made. But even if the bye-law extended to persons not directors, it expressly refers to officers of the company in Europe; and the office held by the plaintiff was that of superintendent of the marine at Bombay. In *Richardson v. Mellish*,<sup>(a)</sup> it was decided that an agreement to resign the command of an East-India ship in favor of an individual under a pecuniary penalty, was not an infringement of the bye-law. These subjects are clearly such as do not bind parties in the situation of those in question.

II. As to the statute law, the only statute applicable is the 5 and 6 Ed. VI. c. 16. But that statute cannot affect this question, 1st, because it does not apply to offices under the East-India Company; and, 2dly, because it does not relate to the brokerage of offices, \*but only to actual buying and selling of offices. The statute 49 Geo. III. c. 156, s. 1, which extends to offices under the East-India Company, was not passed at the time when these agreements were made, and therefore cannot affect them.

III. As to the objection that the agreement is illegal, because it is contrary to public policy that such a situation as the captain of an East-India ship should be matter of bargain; there are two grounds on which the supposed impolicy is put. The first of these is from the nature of the East-India Company. Lord Kenyon's dictum in *Blachford v. Preston*,<sup>(b)</sup> that the East-India Company is a limb of the government of the country is relied on; and it is said that, being a limb of the government, the laws which relate to the public offices of the government of the country apply to the officers of the East-India Company. But in *Richardson v. Mellish*,<sup>(c)</sup> Mr. Justice Burrough distinctly states that the situation of captain of an India ship is not a public office, but a mere em-

(a) 2 Bing. 229.

(b) 8 T. R. 93.

(c) 2 Bing. 253.

1825.—*Money v. Macleod.*

ployment in the service of the East-India Company in their situation of a trading company, and not as a territorial company. The principle of public policy therefore, if it has any reference at all to such a case, can only apply to the territorial officers of the East-India Company; and Lord Kenyon's dictum does not apply to an officer who serves that company in their character of traders. The expression of Lord Kenyon, in *Blackford v. Preston*, is a mere dictum, and was not at all necessary for the decision of the case; and Chief

Justice Best, in *Richardson v. Mellish*, refers to it, and distinguishes [\*306] the manner in which that \*case was put by Mr. Justice Lawrence and Lord Kenyon. Secondly, on general grounds it is difficult to comprehend on what principle of public policy the doctrine of brokerage of offices can extend to transactions between private individuals. If it be applicable to such a case as this, it must also apply to employments in every navigation in which the public are concerned. Nor would it stop there. It must on the same ground extend to employments in stage coaches, and every species of public conveyance. It must also take in all the links of recommendation; not only that of the person who recommends to the immediate patron of the offices, but also of all the persons, in the most remote degree, through whom recommendations have been given. If the doctrine were admitted in its application to such cases, there could be nothing more injurious to the trade which it is intended to protect. But it has been decided that brokerage of offices, in a secondary degree, is not within the principle, unless there be a case of oppression. *Purdy v. Stacey*.(c)

The cases in which the sale of the command of East-India Company's ships have not been sanctioned have proceeded on different grounds, as in *The East-India Company v. Neave*; (d) *Thomson v. Thomson*; (e) *Card v. Hope*.(f)

IV. Even if the agreements were illegal as against the East-India Company, that is not conclusive against an account as between the parties. *Osborne v.*

*Williams*.(g) The whole of the defendant's case consists in setting up [\*307] the illegality of the agreement. But the \*agreement itself is onerous, and it appears on the answer that the plaintiff advanced above 1,000*l.* on the footing of its being a valid agreement. That is enough to give a right to an account.

V. The two adventures, of which an account is sought by the bill, sprung from two separate agreements; and, even if the first agreement should be held objectionable, the second must be taken on the grounds on which it is put by the answer of Mr. Macleod, and is then entirely unobjectionable. At least as to the second agreement, therefore, there is a clear title to an account.

Mr. *Horne*, and Mr. *Purvis*, for the defendants, the executors, insisted on the illegality of the agreements, and relied on *Blackford v. Preston*, and *Han-ington v. Duchastel*.(h)

(c) 5 Burr. 2698.

(d) 5 Ves. 173.

(e) 7 Ves. 470.

(f) 2 Barn. &amp; Cres. 661.

(g) 18 Ves. 379.

(h) 1 Bro. C. C. 125. More correctly reported 2 Swan. 159.

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Mr. *Sidebottom* appeared for the assignees of *Hotson*, who had become a bankrupt.

The Vice-Chancellor observed that, as to the second agreement, Captain *Macleod* having stated in his answer that he had entered into it at the request and out of gratitude to Sir Robert Wigram, it was not open to the court to impute to him any other motive with respect to it, and that the plaintiff was therefore entitled to an account of the second voyage: that, not being fettered by Captain *Macleod*'s answer with respect to the first voyage, it did appear to his honor that the agreement of the 1st of February 1804 afforded intrinsic \*evidence of an engagement between the plaintiff and Captain [‘308] *Macleod* to the effect alleged in the answer of the defendants, the executors; it being wholly irrational to suppose that Captain *Macleod* would give to the plaintiff much the greater share of the profit of his command without some powerful inducement; and no other inducement being suggested by the plaintiff except the assistance as to the advance of money, which it was said he might derive from his connection with the plaintiff, but which was not stipulated for in the agreement, and could be no adequate inducement; and that the obligation of honor and the condition of secrecy, which were to be found in the agreement, were clear evidence that, in the opinion of the parties, the transaction was not of a nature which would bear the light.

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The Vice-Chancellor directed an issue to be tried at law as to the first agreement, in the following terms:—“Whether the agreement of the 1st of February 1804, in the pleadings mentioned, was entered into by the late defendant, Donald *Macleod*, either wholly or partly in consideration of assistance rendered or supposed to be rendered by the plaintiff to the said late defendant, in procuring for the said late defendant the command of the ship *Walthamstow* in the said agreement named.”[1]

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\*TYLER V. DRAYTON.

[\*309]

1825, 2d May.—*Practice*.—*Production of Deeds*.

If a bill is filed to set aside a conveyance on the ground of fraud, the court will not, on motion, order a production of the conveyance.

THE object of the bill was to set aside a sale and conveyance of certain estates made by Griffith Jenkins, deceased, the plaintiff's nephew, to the defendant, as having been obtained for an inadequate consideration by taking advan-

[1] An agreement founded on a consideration against public policy whether for the whole or part only, is void; as an association to buy and sell public lands of the government, and to prevent a fair competition. *Carrington v. Catler*, 2 Stew. (Alabama,) Rep. 175. So an agreement between two persons, not to bid against each other, at a sheriff's sale, but to divide the profits. *Hawley v. Cramer*, 4 Cow. 719.



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tage of the inexperience, imbecility of mind, and embarrassed circumstances of the vendor. The bill alleged that the plaintiff, on her nephew's decease, became entitled to these estates under the settlement on the marriage of her late father and mother, and charged that the defendant was in possession of that settlement, and of other deeds and documents relating to the estates, and to the sale and conveyance to him, and required him to set forth a schedule thereof. The answer denied all the allegations of fraud in the bill. The schedule annexed to it, set forth, as required by the bill, a list of the title-deeds, the settlement, and the defendant's purchase-deeds.

The plaintiff now moved for the production of all the deeds mentioned in the schedule, or such of them as the court should be of opinion that he was entitled to inspect.

The only deeds which the defendant objected to produce were the purchase-deeds.

Mr. Agar, Mr. Sugden, and Mr. Farrar, for the plaintiff, contended that the purchase-deeds ought to be produced, and cited *Taylor v. Milner*,<sup>(a)</sup> *Beckford v. Wildman*,<sup>(b)</sup> *The Princess of Wales v. Lord Liverpool*,<sup>(c)</sup> and *Balch v. Symes*,<sup>(d)</sup> and relied on the following passage of the judgment in the last case: "Where a deed is sought to be impeached, the plaintiff is entitled to have it produced, and no lien can protect the defendant from producing it; for it is the object of the suit that the deed may be declared a nullity." They added that it was common, in title bills, to allege that deeds and other documents were in the possession of the defendant, from which it would appear that the plaintiff was entitled to tithes in kind.

Mr. Heald, for the defendant, distinguished *Taylor v. Milner*, and *Beckford v. Wildman*, from the present case, saying that the motion in the former was for the production of letters only, and had nothing to do with deeds, and, in the latter, to have deeds impounded in the master's office until the hearing; he added that the court would never compel a production of deeds if the answer denied that the plaintiff had any title to the relief prayed by his bill; that here all the allegations of fraud, and, consequently, the whole equity of the plaintiff, were entirely denied; and that, if this motion were granted, a person who wanted to see a deed belonging to another for the purpose of picking a hole in it, would have nothing to do but to file a bill containing a fictitious case of fraud, and then to move for the production of the deed.

The Vice-Chancellor said that, where a defendant referred to his schedule as containing all deeds, papers, &c. in his custody or power relating to the matters in question, there the plaintiff was entitled to the inspection of [\*311] all such deeds, papers, &c. as of course; unless it appeared, by the description of any particular instrument in the schedule, or by affidavit, that it was evidence, not of the title of the plaintiff, but of the defendant, or that the plaintiff had otherwise no interest in its production; and he or-

(a) 11 Ves. 41.

(b) 16 Ves. 438.

(c) 1 Swan. 114.

(d) 1 Turn 87.

1825.—Tyler v. Drayton.

dered the defendant to produce all the deeds mentioned in the schedule, except the purchase-deeds.[1]

[1] Lord Comm'r Shadwell divides cases of this description into three classes: "1. Where the documents are not referred to, but are admitted to be in the defendant's possession, there the question whether the defendant shall produce them or not is determined by considering whether the documents do or do not relate to the title of the plaintiff. If they relate solely to the title of the defendant, in that case the order for production is not made; on the other hand if they are material to the plaintiff's case, the court will order their production. Plaintiffs could only call for those papers in which they had shown that they had a common interest with defendant. 2. In the case where the documents are referred to, and not admitted to be in the defendant's possession, it is perfectly clear that the court cannot order production unless it turns out that the documents stated not to be in the possession of the defendant happen to be in the hands of some person over whom the defendant evidently has control. 3. A third class of cases is where the contents of instruments are in part stated in the answer, and referred to for greater certainty." After an examination of authorities the Lord Comm'r proceeds: "It appears therefore upon a review of the cases, to be perfectly settled, that where a defendant in his answer states a document shortly or partially, and for the sake of greater caution refers to the document in order to show that the effect of the document has been accurately stated, in such a case the court will order the document to be produced." Again: "It seems to be consistent with justice, that if the defendant makes a document a part of his answer, the plaintiff is entitled to know what that document is, because he has a right at the hearing to read such parts of the defendant's answer as he thinks fit. It is to be observed also, that if the plaintiff should think proper to amend his bill, and require the deed to be set forth at length, it would be a matter of course that the deed should be so set forth." *Hardman v. Ellames*, 2 Mylne & Keene, 732. Where the bill alleged certain suspicious circumstances, appearing on the deed, constituting the defendant's title, which it was sought to impeach for fraud, and the defendant answered that he was a purchaser for valuable consideration without notice of the fraud, yet as he did not in his answer deny that he had notice of those circumstances, the deed was ordered to be produced: for "a purchaser for valuable consideration is bound to answer all the allegations that tend to show that he had notice of the fraud." *Kennedy v. Green*, 6 Sim. 6. It is not a sufficient objection to the production of papers, to the production of which under the general rule, as being referred to in the answer, the plaintiff would be entitled, that they might disclose the names of witnesses intended to be examined, and evidence intended to be given on behalf of the defendant in certain actions at law, and in the *present suit* which was a bill of discovery, in aid to a defence to an action at law; but the defendant will be protected as to communications between himself and his professional advisers. *Storey v. Lord Lennox*, 1 Mylne & Craig, 525. *Vide Hawk v. Kemp*, 3 Beav. 288. *Attorney-General v. Strutt*, 3 Beav. 396. *Bunbury v. Bunbury*, 2 Beav. 173. *Morrice v. Swaby*, 2 Beav. 500. *Ferquharson v. Balfour*, Turn. & Russ. 184. *Hughes v. Biddulph*, 4 Russ. 190. *Parsons v. Robertson*, 2 Keen, 605. *Welford v. Stainthorp*, 2 Beav. 587. *Storey v. Lord Lennox*, at the Rolls, 1 Keen, 341. *Bolton v. Corporation of Liverpool*, 1 Myl. & K. 88. *Nias v. Railway Co.*, 2 Keen, 76. S. C. 3 Myl. & Cr. 355. *Curling v. Perring*, 2 Myl. & K. 380. *Greenlaw v. King*, 1 Beav. 137. *Adams v. Fisher*, 3 Myl. & Cr. 526. *Bowes v. Fernie*, id. 632. When the defendant by his answer admits the possession of books and papers relating to the matters in question, but states that they are in constant use in his business, and necessary for that purpose; the court only orders in the first instance, that they shall be produced to the plaintiff, at the place of business at which they are stated to be in use; leaving it open to the plaintiff if he does not obtain a satisfactory inspection of them there, to apply to the court for a further order. *Grane v. Cooper*, 4 Myl. & Cr. 263. The defendant is entitled to seal up such parts of books of account as he swears have no relation to the matters in controversy. *Napier v. Staples*, 2 Moll. 270.

1825.—*Hemming v. Gurrey.*

## HEMMING v. GURREY.

1825, 5th May.—*Will.—Construction.*

An annuity of 200*l.* was bequeathed to A., provided he paid 2,000*l.* due to the testator; but if he paid 1,000*l.* then an annuity of 100*l.*, with a recommendation to the executor to lean on the side of mercy, and to be liberal to him. A. paid off 1,400*l.* The executor (who was also residuary legatee) paid the annuity of 200*l.* during his life, and waived in writing, but did not formally release, the remainder of the debt; his executor may, notwithstanding, withhold the annuity until the remainder of the debt is paid; *Semble*.

Held, that a second will was made, if not wholly, yet, as to the greater part, in substitution of the first, from the similarity of the form and expressions of the two instruments, and of the annuities and legacies, and from the gifts of two estates specifically devised.

THOMAS HEMMING, by his will, gave an annuity of 100*l.* a year to the plaintiff, Richard Hemming, for his life, and appointed George Hemming his executor and residuary legatee. He afterwards made a codicil to his will in the words following: "I do hereby give and bequeath to my nephew Richard Hemming, the further sum of 200*l.* per annum in addition to what I have already given him by my will, provided he discharges the bonds he now stands indebted to me, which now amount to upwards of 2000*l.*; and if in case he shall pay off 1,000*l.* of what he stands indebted to me, in that case he will be to receive of my executor 100*l.* per annum, but I recommend my executor to lean on the side of mercy to him, and if he reforms his life to be liberal towards him." The testator died in the year 1801.

[\*312] "The plaintiff paid to the testator in his lifetime 1,400*l.* in part of the sums due on the bonds, and, after the death of the testator, George Hemming agreed to pay to the plaintiff the full annuity of 200*l.* under the codicil, and to waive all further claim in respect of the 2,000*l.* This agreement was evidenced by the following memorandum, signed by George Hemming, in the book of his executorship account: "I presume Richard Hemming has paid off 1,400*l.*, but I wish to waive all further claims respecting the 2,000*l.*, and to allow him the full amount for life of 200*l.*, and the 100*l.* in the will, making 300*l.* per annum. Witness my hand, George Hemming."

George Hemming afterwards advanced 200*l.* to the plaintiff, to enable him to purchase two tontine shares for his children, and, upon that occasion, it was agreed that the 200*l.* should be considered as a purchase of 20*l.* a year, part of his annuity, and that, from thence, he should be paid 280*l.* per annum in lieu of 300*l.*: whereupon the following entry was made by George Hemming in the book of his executorship account.

"Richard Hemming having received 200*l.* for the purpose of purchasing two shares for his children in Mr. Drew's tontine, for which, as his annuity was only on his life, 20*l.* per annum was deducted."

George Hemming continued to pay the 280*l.* per annum to the plaintiff, and died in 1807, having left two testamentary papers. The first of these papers was dated on the 28th of May 1780, and was as follows:

1825.—*Hemming v. Gurrey.*

"In the name of God, amen. I, George Hemming, of Bond-street, in the city of Westminster, goldsmith, being \*of perfect mind and [\*313] memory, make this my last will and testament; *Imprimis*, I bequeath to my dear and faithful wife, Anne Hemming, 500*l.* sterling, per annum, for her life, to be placed in and payable out of the long annuities, and to stand in her name, and in the names of my father, Thomas Hemming, and my friends Thomas Ludbey and James Gurrey, in trust for the use of my wife for her life, payable half-yearly; and at her decease to my father, Thomas Hemming, for his life, remainder to my cousin, Richard Hemming, son of my uncle George Hemming, and absolutely for his use, upon his attaining twenty-five years of age, if the forenamed parties are dead, till that time in the same trusts, the party interested to choose a new trustee upon the death of either taking place.

To Eleanor Gurrey, wife of the aforesaid James Gurrey, I bequeath 50*l.* sterling per annum, for her life, out of the long annuities, and in the same trusts as above, remainder of the term after her death to the children of Eleanor Gurrey, by James Gurrey, share and share alike, upon their becoming of age each child to have their respective share transferred to them; but the foregoing devise is not to take place except James and Eleanor Gurrey do assign their share in an estate called the Barrow to John Weaver, and his wife, as is after directed, in the fullest manner in their power.

To Jane Gilley and Benetta Gilley I do bequeath 50*l.* per annum to each of them for life, in the same trusts as aforesaid; but in both instances the name of the parties intended to be benefited to stand in the bank books with the trustees; and, in case of the death of either Jane or Benetta, the deceased's interest for \*the remainder of the term to go to my wife ab- [\*314] solutely, and at her disposal; but, in case of her death previous, then to Thomas or Richard Hemming, as before.

To Catherine Gilley, 250*l.* sterling, provided she assigns all her interest in the Barrow to John Weaver and wife; and I recommend her to place it in the long annuities for her life, and convey it to her children, if any, as she may be married for aught I know; and if so, I hope happily, believing her deserving: to John and Mary Weaver I bequeath the share of James Gurrey and wife, Catherine Gilley, and the two shares I bought of Jane and Benetta Gilley: and I request my wife will assign her share in the Barrow estate absolutely to John and Mary Weaver, for their joint lives, and, at their decease, to their children equally; but I recommend them to sell the estate; but if so, they must place the money in the trusts aforesaid, for the use of their children at their death, and when of age, or forfeit this bequest.

To my wife's five sisters 50*l.* each, over and above all the foregoing bequests, they giving up all papers they may hold respecting payment of money, especially Jane and Benetta.

To my dear wife, my estate at Edgware, absolutely, as she seemed fond of it; but request she never builds there to make a residence, knowing, although

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1825.—*Hemming v. Gurrey.*


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she likes it now, it would not be suitable for to reside at. If she does not part with it, I recommend it to be left by her to Richard Hemming.

[\*315] I leave to Felix Vaughan, son of Samuel Vaughan, \*500*l.* in the same trust, till of age, then absolutely, hoping he will be advised by my trustees.

I leave to Thomas Laver, as some return for his father's faithful services, 500*l.* in the same manner as I have done above to Felix Vaughan.

To my respected friend, Alexander Baxter, esquire, a piece of plate of 100 guineas value, if he be alive at my decease.

To Mary Mapletoft, and Beatrix Peirce, each 200 guineas, for their sole use and benefit.

To my dear wife 3,000*l.* absolutely at her disposal, and to her sole use.

To my dear father, my share of Ingatestone estate; and to him, Thomas Ludbey, and James Gurrey, my three executors, 500*l.* each, and likewise to my wife all my household furniture, pictures, and whatever I may die possessed of, the rest and residue of all my effects, appointing her to act as trustee in conjunction with the above-named, believing firmly she will benefit and show kindness to all those she knew I esteemed, or that were deserving. I likewise bequeath my esteemed friend John Brewster, esquire, 100 guineas. If his death takes place previous to mine, then equally to his children.

As to my wife, if she does marry again, which I by no means disapprove of, I hope she will gain one deserving her, and that will esteem her as she [\*316] deserves; only advising her to have her fortune settled upon her \*and her children previous to marriage. Witness my hand this 28th of May, 1780."

The other paper was as follows:—"August 26th, 1780.—I, George Hemming, of Bond street, goldsmith, being of sound mind and memory, do make and ordain this to be my last will and testament. *Imprimis*, I bequeath to my dear wife Ann Hemming, formerly Ann Gilley, so much money as will purchase 500*l.* sterling, per annum, in the long annuities, granted by government, and the income thereof to be received by the said Ann Hemming during her life, for her own use and benefit, and, at her death, to my child or children, for their own use and benefit, equally. In default of issue, then to my father Thomas Hemming, for his life, and at his death to go to my nephew Richard Hemming, for the remainder of the term, or absolutely at his disposal, when the said Ann and Thomas Hemming are both dead; the principal at my death to be placed in the names of Ann Hemming, my wife, my dear father Thomas Hemming, my valued friend Thomas Ludbey, and my worthy kinsman, James Gurrey, in trust for the said Ann, or my children, and Thomas Hem- £.  
ming, during their lives respectively; supposed at or about 9,000  
I bequeath to my nephew Richard Hemming, after the four following  
shares are purchased and assigned over to my executors, all the es-  
tate called the Barrow, in the county of Hereford . . . 1,000

1825.—Hemming v. Gurrey.

I bequeath to John and Mary Weaver, 200 <i>l</i> . provided they assign their share and right in the Barrow estate to my executors . . . . .	200
[*317] *I likewise bequeath to the said Mary Weaver 50 <i>l</i> . per annum in the long annuities, for her life, and, at her death, to the issue of her body by John Weaver ; in default of issue, then at her disposal . . . . .	900
I bequeath to James and Eleanor Gurrey, in like manner, 200 <i>l</i> . for their share in the Barrow estate . . . . .	200
I bequeath to Eleanor Gurrey, wife of James Gurrey, 50 <i>l</i> . per annum in the long annuities, for her life, and, at her death, equally to the issue she may have by James Gurrey ; in default of such issue then at her disposal . . . . .	900
To Jane Gilley I bequeath 50 <i>l</i> . per annum in the long annuities, absolutely at her disposal, in lieu of any other annuity I may have granted to her . . . . .	900
To Benetta Gilley I bequeath 50 <i>l</i> . per annum in the long annuities, at her disposal, in lieu of any other annuity I may have granted to her . . . . .	900
To Catherine Gilley, sister of the before-named, I bequeath 300 <i>l</i> . provided she do make a good assignment of her share of the Barrow . . . . .	300
To my dear wife 200 <i>l</i> . for the same purpose . . . . .	200
To my dear wife Ann Hemming I leave my estate of meadow land at Edgware in Middlesex, for her sole use and benefit, but do not recommend her to build at or reside there ; if she finds that my nephew Richard Hemming is deserving, then she may leave it to him, if she approves : but if I should leave issue, then, after my wife's	
[*318] decease, I will *and devise this estate to the said issue for ever . . . . .	1,500
To my dear wife, Ann Hemming, I leave my house in Tottenham Court Road . . . . .	850
I leave to my dear wife, to be paid to her within one month from my decease, 200 <i>l</i> ., and desire that all the bequests that relate to her may be settled as soon as possible after my decease, in order that she may be in the receipt of her income . . . . .	200
To Felix Vaughan, my nephew, to be placed in trust till of age . . . . .	500
To Richard Hemming, my nephew, in the same manner . . . . .	500
To Thomas Laver, son of Benjamin Laver, as a token of my esteem, in trust till he is of age . . . . .	500
To my respected friend Alexander Baxter, Esq. a piece of plate, if he is alive, value of 100 guineas . . . . .	105
To Beatrix Pierce and Mary Mapletoft, for their sole use, 100 guineas to each . . . . .	210

£ 18,865"

It will be observed that the concluding part of the first will was wholly omit-

1825.—*Hemming v. Gurrey.*

ted in the second, which contained no appointment of executors, nor any residuary bequest. Both these papers were proved in the ecclesiastical court by the executors named in the first of them.

After the death of George Hemming, Anne Hemming, his widow, continued to pay to the plaintiff, Richard Hemming, the annuity of 280*l.* per annum under the will of Thomas Hemming. She died in 1818.

[\*319] \*The present suit was instituted by Richard Hemming against the personal representatives of Thomas Hemming, George Hemming and Anne Hemming, for the purpose of enforcing the payment of the annuity of 280*l.* under the will of Thomas Hemming; and also of the two annuities of 500*l.* each under the two testamentary instruments of George Hemming, which the plaintiff insisted were cumulative.

Mr. *Hart*, and Mr. *Perkins*, for the plaintiff:—

1st. As to the annuity of 280*l.*, the acts of George Hemming amount to an actual release of the debt. It would be contrary to all the principles of equity to allow an executor to enforce payment of a debt which the testator himself, under his hand, has declared he did not intend to claim. But especially under the circumstances of this case, considering the expressions in the will of Thomas Hemming, and the written declaration of George Hemming, the court cannot consider the executor entitled to set up any demand, in respect of that debt, against the plaintiff.[1]

2dly. As to the annuities of 500*l.* each given to the plaintiff by each of the two testamentary papers, that given by the latter paper cannot be considered as a substitution of the annuity given in the former, as there is not that double coincidence which has been held necessary to enable the court to decide that the latter gift was a substitution for the former. *Hurst v. Beach*,(a) *Attorney General v. Harley*,(b) *Gillespie v. Alexander*.(c)

Mr. *Heald*, Mr. *Boteler*, and Mr. *Wigram*, for the defendant, were [\*320] desired by the Vice-Chancellor to \*confine themselves to the first point, as to the annuity of 280*l.*

There has been no act amounting to a release of the debt due by the plaintiff. The memorandum of George Hemming is not sufficient. It would not have bound himself, and therefore cannot be held to bind his executors. The result of repeated decisions is, that no act of bounty which has not been perfected by a testator, can be held to avail against his executor. *Adams v. Claxton*,(d) *Hooper v. Goodwin*,(e) *Colleen v. Missing*.(f)

The VICE-CHANCELLOR:—It is plain that it was not the purpose of G. Hemming, or of his widow and residuary legatee, A. Hemming, to enforce the payment of the money remaining due from the plaintiff on his bonds, as the condition of his being entitled to the full annuity of 280*l.* under the will of

(a) 5 Madd. 351.

(b) 4 Madd. 263.

(c) Ante, p. 145.

(d) 6 Ves. 226.

(e) 1 Swan. 485.

(f) 1 Madd. 176.

[1] As to precatory words in a will, vide *Hardwood v. West*, 1 Sim. & Stu. 398, and notes, *ibid.*

1825.—*Mellor v Hall*.

J. Hemming; but it is quite another question whether any act was done which could conclude their representatives from enforcing such claim. It does not appear whether the bonds for 2,000*l.* were ever delivered up to the plaintiff, or cancelled or destroyed, and I shall therefore direct an inquiry before the master upon those points, with liberty to the master to state any circumstances specially.

With respect to the plaintiff's claim of two annuities of 500*l.* each, under the two testamentary papers of G. Hemming, I am of opinion that the second instrument was not made as an addition to, but as a \*substitu- [\*321] tion for, the first, if not wholly, at least in the greater part. and plainly as to the annuities in question. This is evident from comparing the form and expression of the two instruments, from the general similarity of the two annuities and legacies, and from the particular gifts of the Barrow and Edgware estates.

Declare, therefore, that the plaintiff is entitled to one annuity of 500*l.* only under the will of G. Hemming.[1]

## MELLOR v. HALL.

1825, 6th and 13th May.—*Practice*.

A defendant, against whom an attachment had issued for want of an answer, tendered the costs of the contempt, and then filed a demurrer. The demurrer was ordered to be taken off the file.

THE time for answering having expired, and the defendant not having obtained an order for further time, an attachment was issued against him. The defendant afterwards tendered to the plaintiff the costs of his contempt, and then put in a general demurrer.

Mr. Skirrow, for the plaintiff, now moved that the demurrer might be taken off the file for irregularity. He referred to *Gilb. For. Rom.* 71; *Beames' Ord. Cha.* 178; *Hind's Practice*, 115; *Pract. Reg.* 163; *Harr. Ch. Pract.* 214; (a) *Sowerby v. Warder*; (b) *E. India Comp. v. Henckman*; (c) *Curzon v. Lord De la Zouch*; (d) *Broughton v. Jones*. (e)

Mr. Bethell, contra, cited *Waters v. Chambers*; (f) and *Sanders v. Murney*. (g)

\*THE VICE-CHANCELLOR:—It is clear, that, after an attachment, un- [\*322] less it be an attachment with proclamations returned, a defendant, upon payment or tender of his costs, may put in a plea or answer without special order.[2] The question is, whether he can demur alone in such case,

(a) But see, *ibid.* 215.

(b) 2 Cox, 268.

(c) 3 Bro. C. C. 372.

(d) 1 Swan. 185.

(e) 3 Madd. 42.

(f) Ante, 1 vol. 225.

(g) *Ibid.*

[1] When legacies are substitutional or cumulative, see *Strong v. Ingram*, 6 Sim. 197; *Dent v. Bennett*, 7 Sim. 539; *Simon and others v. Barber and others*, 1 Tamlyn, 14.

[2] Vide *Foulkes v. Jones*, 2 Beav. 274.



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1825.—Mellor v. Hall.

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as well as answer. The language of Lord Clarendon's order, and the text of the Lord Chief Baron Gilbert, seem to import no difference in this respect: but in the cases referred to, from 3d Bro. C. C. and 2d Cox, it is expressly stated that a defendant cannot demurr alone after process of contempt has issued against him: and I find that such is the received practice at this day. This demurrer, therefore, must be taken off the file.

Reg. Lib. B. 1824, f. 1151.

END OF PART II.

# CASES IN CHANCERY

BEFORE

## THE VICE-CHANCELLOR.

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\*WRIGHT v. ROSE.

[\*323]

1825, 28th April.—*Conversion.*

Where a mortgage deed contains a power of sale, with a direction that the surplus produce shall be paid to the mortgagor, his executors and administrators, if a sale takes place in the lifetime of the mortgagor, the surplus is personal estate; but if, after his death, it is real estate.

THE bill stated that Joseph Wright was seised in fee of a freehold estate; that he borrowed 300*l.* from James Rose, the defendant, and secured the repayment of it, with interest, by executing a mortgage deed of the estate, with a power of sale; and that, by the terms of the deed, it was provided that the surplus moneys to arise from the sale, in case the same should take place, were to be paid to Wright, his executors or administrators.(a)

In 1822, Wright died intestate, and without ever having been married. All the interest due on the \*mortgage money had been duly [\*324] paid by him up to the time of his death, but the principal remained unpaid. The interest that accrued due after his death having remained unpaid, Rose, the mortgagee, entered into possession, and afterwards sold the estate under the power of sale, for a sum which considerably exceeded the mortgage money and interest.

Joseph Wright, the mortgagor, was an illegitimate child, and, having died without issue, a claim was set up on the part of the crown to the mortgaged estate. But, on inquiry being made as to the value of the property, it was found to be subject to the mortgage, and the claim was abandoned: and, after the sale, letters of administration of the estate of Joseph Wright were granted to the plaintiffs.

The bill, after setting forth these facts, and alleging that a large surplus remained in the hands of the defendant, Rose, after satisfying the mortgage debt and interest, prayed that an account might be taken of the moneys produced by the sale, and of the amount due in respect of the mortgage; and that the de-

(a) It did not appear on the face of the bill to whom the right of redemption was reserved.

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 1825.—Fox v. Morewood.
 

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sendants might be decreed to pay over the surplus to the plaintiffs as the personal representatives of Joseph Wright.

To this bill the defendant put in a general demurrer for want of equity, which now came on to be argued.

Mr. *Cooper* for the bill.

Mr. *Koe* for the demurrer.

The VICE-CHANCELLOR :—If the estate had been sold by the mort-  
[\*325] gagee in the lifetime of the mortgagor, then the surplus moneys\* would have been personal estate of the mortgagor, and the plaintiffs would have been entitled. But the estate being unsold at the death of the mortgagor, the equity of redemption descended to his heir, and he is now entitled to the surplus produce.

Demurrer allowed.

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### FOX v. MOREWOOD.

1825, 20th May.—*Practice*.

A second order to dismiss cannot be obtained on the day on which a former order to dismiss is discharged.

ON the 12th of April the defendant obtained an order to dismiss the bill for want of prosecution.

On the 30th of the same month, the plaintiff, on special grounds, moved for and obtained an order discharging the order to dismiss. On the same day, the defendant, on a motion of course, obtained a new order to dismiss the bill for want of prosecution, and, on that same day also, the plaintiff filed his replication.

The court was now moved, on behalf of the plaintiff, to discharge the last order to dismiss, for irregularity.

Mr. *Swanston*, for the motion :—*Reynolds v. Nelson*, (a) decided that an order to dismiss a bill cannot be obtained if a replication be filed on the day on which the motion is made. *Lorimer v. Lorimer*, (b) decided that an order to dismiss operated from the time when it was pronounced.

[\*326] \*Mr. *Whitmarsh*, for the defendant, relied on the facts, that, after the defendant had on the 30th of April moved to dismiss the bill, he on the same day obtained the usual certificate from the clerk in court of the answer having been filed in February 1824, and that, at the time when that certificate was obtained, the replication had not been filed, and that it was not filed for some hours afterwards.

The Vice-Chancellor discharged the order to dismiss of the 30th of April, with costs, stating, that, besides the authority of *Reynolds v. Nelson*, there was another objection; that, there being no fraction of a day, the second motion to dismiss could not be made on the same day as the former order to dismiss was discharged.

1825.—Dixon v. Dawson. Slawin v. Farside.

\*DIXON v. DAWSON. SLAWIN v. FARSIDE.

[\*327]

1825, 20th and 29th June.—*Will.—Leaseholds.—Conversion.*

Testatrix devised all her messuages, lands, tenements, hereditaments and real estate to trustees, in trust to sell, and out of the produce to pay her funeral and testamentary expenses and legacies, except her charitable legacies which she directed to be paid out of her personal estate, legally applicable to that purpose, and not out of any part of her said messuages, lands, &c. which she might die seised or possessed of; and she also directed her trustees to keep separate accounts of the proceeds of her messuages, &c. and of her personal estate legally applicable for charitable purposes; and that, if the proceeds of her messuages, &c. should be insufficient to pay the legacies directed to be paid therewith, the trustees should apply her personal estate in payment of such legacies; Held, 1st, that notwithstanding the personal estate was more than sufficient to pay the charitable legacies, no part of it could be applied to pay the other legacies until the proceeds of the real estate were exhausted; 2d, that the testatrix's leaseholds passed to the trustees, under the devise of all her messuages, &c.; 3d, that her heirs and next of kin, and not her residuary legates, were entitled to the surplus proceeds of her freeholds and leaseholds; and 4th, that the freeholds having been properly sold in the heir's lifetime, the surplus was part of his personal estate.

ALICE SHEPHERD devised certain messuages and other hereditaments to William Bramley, charged with the payment of 100*l.* to her executors and trustees, to be applied in discharging such of the legacies mentioned in her will as the same might legally be applied to discharge, and after giving some specific legacies expressed herself as follows:

"I do hereby give, devise and bequeath all my messuages, dwelling-houses, buildings, lands, tenements, hereditaments and real estate whatsoever, and wheresoever, and of what nature or kind soever, not hereby otherwise disposed of (the copyhold part whereof I have surrendered to the use of this my will,) with the rights, privileges, members and appurtenances thereto respectively belonging, unto and to the use of my friends the Rev. John Tripp, Watson Farside, \*and Robert Stockdale, their heirs, executors, [\*328] administrators and assigns, according to the nature and tenure thereof respectively, upon the trusts nevertheless, and to and for the uses, intents and purposes, and under and subject to the provisoes and declarations hereinafter mentioned, expressed and declared of and concerning the same; and I do hereby give and bequeath unto and to the use of the said John Tripp, Watson Farside, and Robert Stockdale, their executors, administrators and assigns, all my money, securities for money, goods, chattels, and all other my personal estate and effects whatsoever, not hereby otherwise disposed of, upon the trusts, and to and for the uses, intents and purposes, and under and subject to the provisoes and declarations, hereinafter mentioned, expressed and declared of and concerning the same (that is to say) upon trust that they the said John Tripp, Watson Farside, and Robert Stockdale, and the survivor and survivors of them, and the heirs, executors and administrators of such survivor, do and shall, as soon as conveniently may be after my decease, sell and absolutely dispose of all and singular the said messuages, buildings, lands, tenements, hereditaments and real estate devised to them as aforesaid, and also call in and

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 1825.—Dixon v. Dawson. Slawin v. Farside.
 

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compel payment of all sum and sums of money which may be due and owing to me at the time of my decease, and do and shall absolutely sell and convert into money all other my goods, chattels, personal estate and effects bequeathed to them as aforesaid, which shall not consist of money; and that they my said trustees do and shall take and keep an account of the moneys and produce arising from the sale of my said messuages, buildings, lands, tenements, hereditaments and real estate, and also a distinct and separate account of

[\*329] the \*ready money I may happen to have by me at the time of my decease, and of my money which may then be placed out at interest, and also of the money arising from the sale of such of my personal estate, substance and effects as are hereby saleable, and legally applicable for the charitable purposes herein mentioned: and upon further trust that they the said John Tripp, Watson Farside, and Robert Stockdale, and the survivors and survivor of them, and the heirs, executors and administrators of such survivor, do and shall, in the first place, by, with and out of the money to be raised by the sale of my said messuages, buildings, lands, tenements, hereditaments and real estate devised to them as aforesaid, pay and discharge all my just debts, and also the expenses of my funeral, and of the erection of a tombstone, and of the protection, repairs, preservation thereof, and all other expenses in anywise concerning my burial, and also the probate and registering of this my will, and all other incidental expenses hereby directed to be paid thereout: and upon further trust, that they, the said John Tripp, Watson Farside, and Robert Stockdale, and the survivors and survivor of them, and the heirs, executors and administrators of such survivor, do and shall, by, with and out of the money arising from the sale of my said messuages, buildings, lands, tenements, hereditaments and real estate, if the same shall be sufficient for that purpose, pay and discharge the several annuities now subsisting and payable under and by virtue of the will of my late brother Francis Shepherd, deceased, and also the several legacies and sums of money hereby given and bequeathed, or directed to be paid or applied, to and for the use of the several legatees

[\*330] and persons after named, except the annuities hereby \*directed to be paid unto my relations Mary Guiseley and Sarah Guiseley, and also except the legacies and sums of money hereby directed to be paid or applied to or for charitable uses and purposes, which I hereby direct to be paid out of the money I may have in my possession and out at interest at the time of my decease, and out of the money arising from the sale of such of my personal substance and effects as are hereby made saleable and legally applicable for such purposes, and not out of the money arising from the sale of my said messuages, buildings, lands, tenements, hereditaments or real estate, or any part thereof. But in case the money arising from the sale of my said messuages, buildings, lands, tenements, hereditaments and real estate shall be insufficient for the payment of the several annuities, legacies and sums of money hereby directed to be paid therewith, then upon further trust that they, the said John Tripp, Watson Farside, and Robert Stockdale, and the survivors

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and survivor of them, and the executors and administrators of such survivor, do and shall (after having first paid and applied the whole of the money arising from the sale of my said messuages, buildings, lands, tenements and real estate according to the directions of this my will) pay and apply so much of my money and personal estate, as may be necessary, in and towards the payment of the said several legacies and sums of money to and for the use of the several persons after mentioned; that is to say,—[Here followed trusts for payment of several pecuniary legacies to the testatrix's friends, relations and servants, with a direction that they should be paid at the expiration of twelve calendar months after her decease, or as soon after that time as her estate should be disposed of and the purchase money received for the \*same, and [\*331] also for the payment of legacies of 21*l.* and 200*l.* to the treasurers of two charitable institutions,] which two said several sums of 21*l.* and 200*l.* I do hereby direct shall be raised and paid out of my ready money, and such part of my personal estate as by law I may or can charge with the payment thereof, (and not out of any part of my lands, tenements, hereditaments or real estate,) and be respectively applied towards carrying on the benevolent designs of the said several societies: and upon further trust, that they the said John Tripp, Watson Farside, and Robert Stockdale, or the survivors or survivor of them, or the executors, administrators or assigns of such survivors, do and shall, by, with and out of such part of the money I may have in my possession and placed out at interest at the time of my decease, and of the money arising from the sale of my personal estate and effects hereby made saleable only as may be legally applied for the purposes after-mentioned, (and not out of any part of my said messuages, lands, tenements, hereditaments or real estate which I may die seised or possessed of,) place out and invest the sum of 3,000*l.*, of lawful money of Great Britain, in the purchase of stock in the three per cent. consolidated bank annuities, or three per cent. reduced annuities, in their names. [The testatrix then directed her trustees to pay out of the dividends of the stock so to be purchased an annuity of 60*l.* to Mary and Sarah Guiseley, and to pay the residue of the dividends, and the whole after the decease of the survivor of these two annuitants, for certain charitable purposes.] And upon further trust, that they, the said J. T., W. F. and R. S., do and shall lay out and invest the sum of 2,000*l.* of lawful money of Great Britain, arising from the residue and remainder of my ready money, and \*money out at interest, and of the money arising from the sale of [\*332] my personal estate and effects, which may be legally applied for the purposes herein mentioned, and not from and out of any part of my said messuages, lands, tenements, hereditaments or real estate, and not hereby otherwise disposed of, in the purchase of stock [as in the last bequest, with directions to apply the dividends for certain other charitable purposes. The testatrix then directed her trustees to transfer into their own names 1,000*l.* navy five per cents, part of 1,100*l.* like stock then standing in her name, and to apply the dividends for certain other charitable uses, and to pay out of her

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personal estate and effects legally applicable for such purposes, two sums of 200*l.* to the treasurers of two charitable establishments.] And should any part of my personal estate and effects still remain undisposed of, after satisfying all my just debts and funeral and other incidental expenses, and providing for the said charities herein mentioned and intended to be hereby established and augmented, and paying the several legacies or sums of money herein bequeathed or directed to be paid thereout, then upon further trust that they, my said trustees, shall and do pay and transfer the residue and remainder of my said estate and effects, not otherwise disposed of, unto my relation the Rev. Dr. Wm. Craven, his executors, administrators and assigns, to and for his and their own use and benefit."

The testatrix afterwards made a codicil to her will, as follows:—"I, Alice Shepherd, of Knaresborough, in the county of York, spinster, do make, [\*333] publish, and declare this \*to be a codicil to my last will and testament.

I do hereby revoke the devise unto my agent, Mr. William Bramley, of the dwelling-houses, hereditaments and premises in the occupation of John Wood, or his tenants; and, in lieu thereof, I do hereby give and bequeath unto the said William Bramley the sum of 300*l.*, to be paid to him, by my executors, at the end of twelve calendar months next after my decease; and I do hereby give, devise and bequeath unto my executors and trustees, John Tripp, Watson Farside, and Robert Stockdale, and to their heirs and assigns, the said dwelling-houses, lands, tenements, hereditaments and premises, situate within the manor of Thornton with Bishopside, in the county of York, and now or late in the occupation of John Wood or his tenants, upon trust to surrender and convey the same unto James Ingleby, the purchaser thereof, his heirs and assigns, upon payment of the purchase money, and according to the agreement I have entered into with him; and upon trust to apply such purchase money as part of my personal estate, according to the directions and in the manner mentioned in my said will respecting my personal estate; and I do hereby confirm my said will in all other respects."

The testatrix left Philip Dixon her heir at law, and customary heir.—The trustees sold all her real estates in Dixon's lifetime, but her personal estate was more than sufficient to pay her funeral expenses, debts and charitable legacies. Dixon afterwards died, having appointed his three children his executors. William Dixon, the eldest of them, also died, leaving Sarah, the wife of John Slawin, his heir at law and personal representative.

[\*334] \*The parties to these causes were the surviving children of Philip Dixon; Richard Dawson, the executor of Stockdale, Dr. Wood, the executor of Dr. Craven, Richard Terry, the executor of Farside, who survived his co-executors, and Mr. and Mrs. Slawin.

Mr. Hart, Mr. Tinney, and Mr. Daniell, for the plaintiffs, the personal representatives of Philip Dixon:—

1st. The real estate is made the primary fund for payment of debts and

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legacies, in order to make the personal estate a clear fund for the charities, and not with any intention of benefit to the residuary legatee. *Hill v. Cock.*(a)

2d. The devise and bequest of the real estate includes the leasehold estates. *Addis v. Clement*,(b) *Thompson v. Lawley*.(c) The leasehold estates must therefore at any rate bear a portion of the debts and legacies.

3d. The residuary bequest does not carry the surplus of the real estate to the residuary legatee, but is undisposed of. *Robinson v. Taylor*,(d) *Maugham v. Mason*.(e)

4th. The real estate having been sold, the surplus is personal estate of the heir. *Smith v. Claxton*.(f)

\*Mr. Sugden, and Mr. Pepys, for Dr. Wood, the representative of [\*335] the residuary legatee:—

1st. In every clause in the will the real estate is mentioned, which shows that the distinction between real and personal estate was all along clearly in the view of the testatrix. It is a fancied construction to say, that the residuary legatee is to have no benefit; for the intention must be inferred from the directions in the will. *Hancox v. Abbey*,(g)

2d. The words are not sufficient to include leasehold estates. Where such estates have been held to pass under a devise of real estates, there has always been some word used which has accurately described the leasehold estate. Thus, in *Lane v. Earl Stanhope*,(h) where a leasehold estate was held to pass under the general devise of real estates, the word "farms" was used, and the only leasehold estate of the testator was a leasehold farm.

3d. The surplus of the real estate goes to the residuary legatee. *Mallabar v. Mallabar*,(i) *Durour v. Motteux*.(k)

The answer states that the residue was paid in 1812 to Dr. Craver, who divided it among the legatees, and in satisfaction of the charitable bequests. The question would be, how it could be got back again. Lately, the question has been much agitated at law, where money was paid by mistake to a party who spent it, how it could be got back. The question in these cases

\*has been, whether the claim, after the money was paid away under [\*336] an honest impression, was not too late.

Mr. Bell, for the heir at law, referred to *Robinson v. Taylor*,(l) and observed, that the funds here had been kept distinct by the testator, whereas in the cases cited on behalf of the residuary legatee, the funds had been mixed. In this case the produce of the real estate had never been received.

Mr. Horne, and Mr. Harrison Batley, for Dawson, the executor of Stockdale. Mr. Barber for Terry, the representative of Farside.

The VICE-CHANCELLOR:—The testatrix in this case expressly directs the produce of her real estate to be applied in payment of her just debts, funeral expenses and legacies (except her charitable legacies,) and directs that her

(a) 1 V. & B. 173.

(d) 2 Bro. C. C. 589.

(g) 11 Ves. 179.

(k) 1 Ves. 320.

(b) 2 P. W. 456.

(e) 1 V. & B. 410.

(h) 6 T. R. 345.

(l) 2 Bro. C. C. 589.

(c) 2 Bos. & Pull. 303.

(f) 4 Madd. 484.

(i) Ca. Temp. Talb. 78.



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personal estate which by law is applicable to charitable bequests shall only be applied in payment of her debts, if the produce of her real estate shall prove insufficient for that purpose. She then directs the payment of her charitable legacies out of the personal estate which by law is so applicable, and gives over the residue to her relation Dr. Craven.

The point raised is that, when the testatrix made the produce of her real estate first applicable to the payment of her funeral expenses, just debts [\*337] and legacies, except charitable legacies, her only purpose \*was to secure the payment of her charitable legacies by means of relieving the personal estate, which by law was applicable to such payment, from the burthen of her debts, funeral expenses and legacies; and that, when her charitable legacies were all paid, it was not her intention that the surplus of her personal estate should be relieved from the payment of her funeral expenses, debts and legacies at the expense of her real estate. It is very probable that in this arrangement her only purpose was, to secure the payment of her charitable legacies: but, as she has expressly directed that her personal estate, applicable to charitable legacies, shall not be applied in payment of her funeral expenses, debts and general legacies, until the produce of her messuages, tenements and real estate is exhausted, the court cannot control her clear expressed intention by any conjecture as to her motives.

In stating the first point, I have, for the sake of conciseness, spoken of the produce of her real estate only; but, when the testatrix directs the sale of her real estate, she uses the words, "all her messuages, dwelling-houses, buildings, lands, tenements, hereditaments and real estate whatsoever, and wheresoever, and of what nature or kind soever, not hereby otherwise disposed of;" and the second question is, whether those general words do or not in this will include leaseholds for years. It may, I think, be stated, on the authorities which have been cited, that, if these general words are not aided by other parts of the will, they will not include chattel leases; but, in a subsequent part of her will, the testatrix, when speaking of the payment of her charitable legacies,

expressly directs that they are not to be paid out of any part of the [\*338] money arising from the sale of \*any part of her said messuages, lands, tenements, hereditaments or real estate, which she may die seized or possessed of; which latter words are applicable to chattels real only: and, upon similar words, great stress was laid in the case of *Addis v. Clement*. It is further to be observed that the testatrix, who has the same trustees for all her property, directs two distinct accounts to be kept by them, one of the produce arising from the sale of her messuages, buildings, &c., and the other of her moneys, and the produce arising from the sale of her personal estate, which is legally applicable for charitable purposes. She must have intended the produce of her chattels real to be included in one of the accounts. They could not be included in the produce of personal estate legally applicable to charitable purposes; and it is consistent with her whole intention that they should form a part of the other account, which consisted

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entirely of property not applicable to charitable purposes. My opinion, therefore is, that the produce of chattels real is applicable, with the real estate, in payment of the funeral expenses, debts and legacies not charitable.

It appears that the produce of the real estate and chattels real was more than sufficient for the payment of the funeral expenses, debts, and legacies not charitable; and the third question is, what is to become of such surplus: whether it is to form a part of the residuary estate given to Dr. Craven, or is undisposed of. The testatrix, after directing that the trustees, out of the moneys and the produce of her personal estate, which is legally applicable for charitable purposes, shall pay the several charitable legacies which she enumerates, proceeds thus:—"And should any part of my \*per- [\*339] sonal estate and effects still remain undisposed of, after satisfying all my just debts and funeral and other incidental expenses, and providing for the said charities herein mentioned, and paying the several legacies and other sums of money herein bequeathed, or directed to be paid thereout, then upon further trust, that they my said trustees shall and do pay and transfer the remainder of my said estate and effects, not hereby otherwise disposed of unto my relation the Rev. Dr. Craven, his executors, administrators and assigns, to and for his own use and benefit." It will be remembered that this personal estate was before expressly subjected to the payment of her funeral expenses, debts and legacies not charitable, in aid of her real estate. Should any part of her personal estate and effects remain undisposed of after satisfying all the charges to which she had subjected it, she gives the remainder of her said estate and effects to Dr. Craven. "Her said estate, and effects," is necessarily confined here to her personal estate and effects undisposed of. This residuary gift does not, therefore, touch the surplus of her real estate and chattels real; and, there being no other residuary gift, such surplus is undisposed of, and, as to the real estate, belongs to the testatrix's heir-at-law, and, as to her chattels real, to her next of kin. The division between the heir-at-law and the next of kin must be in proportion to the value of the respective properties.

At the death of the testatrix she left Philip Dixon her heir-at law, and her real estate was sold by the trustees in execution of her will in the lifetime of Philip Dixon. Philip Dixon died before the trusts of the will were completed; and another question is, whether the surplus of the real estate which devolved to \*him was vested in him as land or money, and belongs [\*340] now to his heir or personal representative. I adhere to the principles which I stated in the case of *Smith v. Claxton*, that, where the whole land is properly sold by the trustees, and there is only a partial disposition of the produce of the sale, there the surplus belongs to the heir as money, and not as land. The surplus in the present case, therefore, belongs to the personal representative of Philip Dixon.[1]

[1] Vide *Marsh v. Wheeler*, 2 Edw. 156.

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The point as to the claim of the next of kin to the surplus of the leaseholds was not raised in the pleadings, and the next of kin of the testatrix were not before the court in that character. The Vice-Chancellor, to save a supplemental suit, directed inquiries as to the next of kin; he said that the costs must be apportioned between the two funds made by the testatrix, but that it was better to reserve the question of costs until after the account taken. The second cause, which was brought by the heir of P. Dixon, was dismissed with costs.

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### DRINKWATER V. COMBE.

1825, 9th May; 1st June.—*Incumbrance.—Executory devise.*

If a tenant of an estate, subject to an executory devise, pays off a charge upon the estate, and the executory devise afterwards takes effect, his executors will be entitled to be repaid the amount of the charge.

WILLIAM COMBE, being possessed of a leasehold estate for a long term of years, situate at Great Hampton, in the county of Worcester, by his will, dated the 19th of February 1760, bequeathed it to his son Francis Combe, for all such estate as he, the testator, had therein. He then bequeathed to his son [\*341] \*Joseph the sum of 300*l.*, to be paid to him at his age of twenty-one years, and to his daughter Hannah Sansom, the sum of 80*l.*, to be paid to her within six months next after his decease, and he charged his leasehold estate with the payment of those legacies, and with the payment of 10*l.* to his sister-in-law Winifred Combe, yearly, during her life. And, in case Francis Combe should happen to die unmarried, he gave the leasehold estate to his other two sons, William and Joseph Combe, their executors, administrators and assigns, as tenants in common, subject to the payment of the legacies and annuity; and he appointed his wife, Ann Combe, and his son, William Combe, executrix and executor of his will.

Upon the decease of the testator, Francis Combe entered into possession of the leasehold estate, and continued in possession until his death. He paid the legacy of 300*l.* to Joseph Combe, and the legacy of 80*l.* to Hannah Sansom; and, during the life of Winifred Combe, he paid her the annuity of 10*l.*

An act of parliament was passed in the sixteenth year of the reign of his late majesty, intituled, "an act for dividing and inclosing the open and common fields, and all other commonable land, within the parish of Great and Little Hampton, in the county of Worcester," by which the several owners and proprietors for the time being of any of the lands thereby directed to be inclosed, being tenants in tail, or for life or lives only, were empowered, with the consent of the commissioners appointed to carry the act into execution, to be testified in writing under their hands and seals, either in and by their award, or in and by any deed or instrument to be executed by them, either [\*342] before or after the execution of their said award, from \*time to time

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to charge the lands, which should be allotted to such owners or proprietors, or persons entitled as aforesaid respectively, with any sum or sums of money not exceeding 40s. for each acre, to be applied for the purposes of defraying their respective proportions of the charges and expenses of passing the act, and other necessary charges incident to and attending such inclosure and division, and the necessary subdivisions of their respective allotments, and to mortgage such lands for a term of years to secure the repayment of such respective sums of money with interest. Accordingly the commissioners, by their award, dated the 2d of April 1777, allotted forty-four acres of land to Francis Combe, in respect of the leasehold premises bequeathed by the testator; and consented and testified that it should be lawful for the owners and proprietors of the lands directed to be inclosed, being tenants in tail, or for life or lives only, to raise, in the manner prescribed by the act, money for defraying their proportions of the charges and expenses before mentioned, which the commissioners certified amounted in the whole to 1,528*l.* 8*s.* 11*d.*, and directed to be paid on or before the 10th of April then instant.

Francis Combe paid his proportion of the 1,528*l.* 8*s.* 11*d.*; but did not exercise the powers, given him by the act, of charging the estate with it.

William Combe the son, and Joseph Combe, died in the lifetime of Francis Combe, intestate.

Francis Combe died in April 1821, unmarried. The plaintiffs were his executors.

\*The personal representatives of Joseph Combe and William Combe [\*343] recovered the possession of the leasehold premises in an action of ejectment, brought against the plaintiffs.

The bill prayed that the leaseholds might be sold, and that the sums paid by Francis Combe in discharge of the legacies and the expenses of the inclosure might be paid to the plaintiffs.

Mr. *Horne*, and Mr. *Lynch*, for the plaintiffs:—If a tenant in tail pays off a charge upon his estate, his executors are not entitled to be repaid the amount, because, though he had not the absolute interest, he could by certain forms have acquired the absolute interest in the estate. But that reasoning does not apply to the case of a person paying off a charge upon an estate which is subject to an executory devise over; for that person can never acquire an absolute indefeasible interest in the property. If a tenant in tail, under a gift from the crown, pays off a charge, he is entitled to be reimbursed by a charge upon the estate; because he can never acquire the fee. That is an analogous case to the present one. The limitation over is in effect the same as the restraint from alienation imposed on a tenant in tail by act of parliament, for the contingency happening, the estate is cut down to an estate for life. By no possibility, unless he married, could F. Combe's estate have been greater than that of an estate for life: therefore, when the inclosure act passed, he was only tenant for life, and consequently was empowered, by that act, to charge the expenses of the inclosure upon the estate. He did not avail himself

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[\*344] of the power, because he considered himself \*to be the absolute owner of the estate. But we submit that the plaintiffs are now entitled to be repaid the expenses out of the estate. As to the legacies, the testator himself contemplated that if the estate went over, it would still be subject to them. *Ware v. Polhill*.<sup>(a)</sup>

Mr. *Ellison*, for the defendant:—There is no resemblance between the case of Francis Combe, and that of a tenant for life: but there is between the case of a tenant in tail and Francis Combe; for if he had married at any time, the property would have become his, absolutely. Nor is there any analogy between the present case and that of a tenant in tail restrained from alienation by act of parliament; for the latter can by no means whatever acquire the absolute interest in the property. In *Jones v. Morgan*.<sup>(b)</sup> Lord Thurlow qualifies the rule as to charges paid off by a tenant for life. He says, that the smallest demonstration that he meant to pay off the charge, will prevent his representative from coming for the money. Here these expenses were paid forty-three years ago, and Francis Combe did no act to show that he meant to charge the estate. *Countess of Shrewsbury v. The Earl of Shrewsbury*.<sup>(c)</sup> *Redington v. Redington*.<sup>(d)</sup> The reasoning in this latter case applies to the present one. Francis Combe might at one time have intended to marry, and then his estate would have become indefeasible.

[\*345] \*The VICE-CHANCELLOR:—I am not aware that the points here argued have ever been decided. If a tenant for life pays off a charge upon his estate, the amount becomes a part of his personal property, unless he manifests an intention that it should not do so. If a tenant in tail pays off a charge upon his estate, the amount does not become a part of his personal property, unless he manifests an intention that it should do so. He who takes an estate defeasible by executory devise, is not like a tenant for life; because, upon a contingent event, his estate may become indefeasible. Nor is he like a tenant in tail; because he cannot, at his own pleasure, render his estate indefeasible. If tenant in tail, having the power at his own pleasure to acquire an absolute fee, and to defeat the remainder, does not exercise that power, it is reasonable to infer that the remainder-man is, in a sense, the object of his own choice, and this is the reason of the rule for presuming, unless the contrary be manifested, that, when the tenant in tail pays off a charge, he means the estate which, in effect, he gives to the remainder-man, should descend to him free from the charge. But he who takes an estate defeasible by executory devise, not having the power to defeat the devisee over, it cannot be intended that such devisee is, in any sense, the object of his choice; and there is not, therefore, the same reason for presuming, when he pays off a charge, that he means to give to such devisee the amount of the charge. In this respect, as well as in the quality of his estate, he who takes such defeasible estate is more within the principle

<sup>(a)</sup> 11 Ves. 257, 282.<sup>(b)</sup> 1 Bro. C. C. 206; and S. C. Fearn v. Cont. Rem. App. No. 3.<sup>(c)</sup> 3 Bro. C. C. 120; and S. C. 1 Ves. jun., 227.<sup>(d)</sup> 1 Ball & Beat. 142,

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that applies to the tenant for life. So, like a tenant for life, he may be restrained from cutting timber, or committing a waste.

\*Declare, therefore, that the plaintiffs are entitled to have the charge [\*346] raised. With respect to the expenses of the inclosure, they are, in their nature, a charge upon the *corpus* of the estate, and fall within the same equitable principle as an actual charge, and must be repaid to the plaintiff.(e)

## GARDNER V. ROWE.

9th May, 19th June, and 5th July.—*Trust.—Bankrupt.*

A lease was granted to W., who afterwards committed an act of bankruptcy, and then executed a declaration of trust in favor of R. On the trial of an issue directed by the court, it was found that W.'s name was used in trust for R.; held, that the lease did not pass to W.'s assignees.

By an indenture, dated the 23d of January 1812, Lord Mount Edgcumbe granted to George Wilkinson of Newcastle-under-Lyme, liberty to dig for tin and other metals and minerals, for twenty-one years, in a piece of ground called the Wheal Regent Sett. On the 23d of August 1813, Wilkinson executed a deed, declaring that he was a trustee of the lease for the defendant Rowe. Wilkinson before he executed this deed had committed an act of bankruptcy; and, in November following, a commission of bankrupt was issued against him, under which he was found a bankrupt. The plaintiffs were his assignees.

At the hearing of the cause, Rowe contended that the lease was granted to Wilkinson, in trust for him; and the court directed an issue to be tried, to ascertain whether that was the fact. The jury found a verdict in the affirmative. The cause now came on to be heard, for further directions on the equity reserved. The following passages in letters written by Wilkinson to Rowe before the granting of the lease, but after the latter had taken possession of the piece of ground in question under an agreement with Lord Mount Edgcumbe, and \*had begun to dig a shaft in it, were set forth in [\*347] Rowe's answer. "19th October 1811,—I am much pleased to hear you are likely to find a bed of mine upon your new set: I conclude in the shaft you had begun to work when I was upon the premises. I sincerely hope it will prove fortunate in the extreme." "5th of January 1812,—I received your's last night, and, since you have left this place, I have received a letter from Captain Clemens, saying he had made application to Mr. Coode for the deeds of Wheal Regent Mine. He tells me they are done, but must be sent to be signed by the Earl of Mount Edgcumbe, and then they will be sent to Newcastle."

Rowe having afterwards written to Wilkinson to give him directions as to the working of the mine, received an answer from him as follows: "9th Jan-

(e) See *Wiggell v. Wiggell*, post, p. 364. [*Astley v. Miles and others*, 1 Sim. 298.]

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uary 1812,—I received your's this night, and I shall, of course, pay strict attention to it in every respect you may depend."

Mr. Agar, Mr. Rose, and Mr. Matthews, for the plaintiffs :—The declaration of trust, as it was executed after the bankruptcy, is nugatory ; for it is quite clear, from the principles of the bankrupt laws, that, after an act of bankruptcy, the bankrupt is incapable of transferring his property. No act of his, done after the act of bankruptcy, can affect his assignees. The commission has relation to the act of bankruptcy, and avoids every subsequent transfer of property. The lease passed to the assignees, as it was in the order and disposition of the bankrupt at the time of his bankruptcy. It was not a chattel real, but [\*348] a license.(a) If, instead of executing a declaration of trust, the bankrupt had executed an assignment, the assignees might have defeated it. Then, can it be argued that a bankrupt may do by a declaration of trust what he could not have done by an assignment ? If a clear trust exists at the time of a bankruptcy, the *cestui que trust* must call on the assignees, not on the bankrupt, to execute it. Is there any case in which a bankrupt has been ordered to indorse a bill of exchange delivered before his bankruptcy. In all cases the assignees are required to indorse it. *Smith v. Pickering*.(b) *Ex parte Mowbray*.(c) If a bankrupt has contracted to sell an estate, his assignees are the parties who are to convey it to the purchaser. All the cases on the subject have decided that, if a bankrupt before his bankruptcy has agreed to give another person a right to a ship, but has not complied with the requisitions of the register acts, no claim can be made by that person to the ship after the bankruptcy.

The Solicitor-General, Mr. Montagu, Mr. Pepys, and Mr. Knight, for the defendant Rowe :—The language used by the legislature, in the fourth section of the statute of frauds, is very different from that in the seventh. By the former, the agreement itself is required to be in writing ; the latter merely enacts that all declarations of trust shall be manifested and proved by some writing signed by the party, who is enabled by law to declare such trust.(d) It is not required that a trust shall be created, but merely that it should be [\*349] proved by writing. *Forster v. Hale*.(e) Before the statute of frauds the trustee might have been called upon to prove the trust. That statute does not deprive a trustee of the power of declaring the truth. *Ambrose Ambrose*.(f) *Dawson v. Ellis*.(g) It only requires that that shall be done in writing which might before have been done by parol. Nor does the statute fix any time beyond which a trust cannot be declared : it may be evidenced in writing at any time after its creation. If the bankrupt, upon his examination, had denied the trust, he might afterwards have declared it by his will. Now it has been established by the finding of the jury, that the lease was taken for

(a) *Doe v. Wood*, 2 B. & A. 724. (b) *Peake* N. P. C. 50. (c) 1 J. & W. 428.

(d) 29 Car. 2, c. 3, s. 4 & 7 ; and see *Wein and Walters*, 5 East, 10.

(e) 3 Ves. 696, and 5, 338 ; and see *Roberts on Frauds*, 101. (f) 1 P. W. 321.

(g) 1 J. & W. 524.

1825.—Gardner v. Rowe.

Rowe's benefit, and that Wilkinson's name was used in trust for Rowe at the time of the bankruptcy; therefore Rowe had a right to call on Wilkinson to execute a declaration of trust in his favor. The question then is, did Wilkinson's bankruptcy prevent him from declaring the trust? There is no case in which that has been decided. An executor or administrator is not divested of his fiduciary character by becoming a bankrupt; then why should a trustee? The bankrupt laws do not incapacitate a trustee from doing an act which he is called upon to do in that character; they only prevent him from disposing of his own property. Wherever an act done by him is merely evidence of a prior right, or the completion of an act, the court will not defeat it. *Awdley v. Halsey*.(h) *Dixon v. Ewart*.(i) This distinction is recognized in *Moss v. Charnock*.(k) It is settled, that a bankrupt cannot execute a power to the prejudice of his assignees, *Doe v. Britain*.(l) But if he had parted with all his interest in the estate before his bankruptcy, he might have given \*evidence to that effect; and he may, in other instances, give evidence [\*350] to the prejudice of his assignees; such as to show priority to the act of bankruptcy, or that the property was in his possession as factor, executor or administrator. So he may indorse a bill of lading after his bankruptcy; not if it was a new transaction; but if he had previously stipulated so to do. *Lempriere v. Pasley*.(m) He may also indorse a bill of exchange, and cause a bargain and sale of lands, sold before the bankruptcy, to be enrolled after the bankruptcy. Wilkinson, therefore, by executing this declaration of trust, has merely done an act of duty, which this court will not suffer those who claim under him to repudiate.

It has been attempted to draw a distinction between such rights as could, and such as could not be enforced. But, unless it is established that the assignee of a bankrupt has all the privileges of a purchaser for valuable consideration without notice, there is no ground for this distinction. The assignee of a bankrupt is not a purchaser for valuable consideration without notice. If the right exists, can it make any difference whether it is or is not capable of being enforced? If a ship at sea is sold before the bankruptcy, and it arrives after the bankruptcy, no court can enforce the endorsement on the certificate of registry within ten days after the arrival of the ship; but the bankrupt may make it. *Mestaer v. Gillespie*,(n) and *Palmer v. Mozon*.(o) Here Rowe advanced all the money for working the mine. Wilkinson suffered Rowe to go on in exercise of his right, and corresponded with, and treated him throughout as the owner of the mine. Under these circumstances this court will not hear Wilkinson, or any \*person claiming under him, say that [\*851] the lease is his. *Norway v. Rowe*.(p) By allowing such a claim to prevail, the court would permit the statute of frauds to be used for the purposes of fraud. The principle upon which the cases as to part-performance

(h) Sir Wm. Jones, 202.  
(m) 2 T. R. 485.

(i) Buck, 94.  
(n) 11 Ves. 637.

(k) 2 East, 399.  
(o) 2 M. & S. 43.

(l) 2 B. & A. 93.  
(p) 19 Ves. 144.



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have been decided, ought to be applied to the present case. Should, however, the court be of opinion that the declaration of trust executed by the bankrupt after his bankruptcy, did not prevent the lease from passing to the assignees, then we submit that the letters are a sufficient declaration of the trust in writing.

The VICE-CHANCELLOR :—On the 1st of January, 1812, the Earl of Mount Edgcumbe, by indenture of that date, granted to the bankrupt George Wilkinson the lease or set of a certain mine, called the Wheal Regent Mine, for a term of twenty-one years, for the considerations therein mentioned; and, by an indenture bearing date the 23d August, 1813, the bankrupt George Wilkinson, who, at the request of Rowe, had previously assigned five fourteenths to one Brodrick, after reciting that his name was used in the said indenture of the 1st January, 1812, as a trustee for Joshua Rowe, assigned and transferred the remaining fifty-nine parts or shares to the said J. Rowe, for the residue of the said term. It is admitted that, prior to this assignment, an act of bankruptcy had been committed by the said George Wilkinson, and that a commission of bankrupt was duly issued against him in the month of November, 1813; and the present bill is filed by the assignees of Wilkinson under that commission against J. Rowe, and certain other persons claiming interest [\*352] under him in the \*Wheal Regent Mine, for the purpose of having it declared that the lease of the Wheal Regent Mine is the property of the bankrupt. On the hearing of this cause the plaintiffs contended that it was established, by the evidence in the cause, that, at the time of the grant from Lord Mount Edgcumbe, it was the purpose of the bankrupt and J. Rowe, that the bankrupt should hold the lease for his own benefit, and not as a trustee for J. Rowe; and the plaintiffs further contended, as a point of law, that if in fact it had been the purpose of the bankrupt and J. Rowe, at the time of the grant from Lord Mount Edgcumbe, that the name of the bankrupt should be used as a trustee for J. Rowe, yet that such trust could not prevail, because there was no written declaration of trust within the statute of frauds other than the indenture of 24th August, 1813, which, being executed by the bankrupt after his bankruptcy, could not operate to defeat the claim of his assignees.

It appeared to me, at the hearing, that I could not properly enter upon the consideration of this point of law, without first coming to a conclusion upon the fact, whether the name of the bankrupt was or not used in the indenture of January, 1812, as a trustee for the defendant J. Rowe, and I directed an issue accordingly. At the trial of this issue, the jury found that the name of the bankrupt was used as a trustee for J. Rowe; and a motion having been made before me by the plaintiffs for a new trial of that issue, I refused to disturb the verdict.

The question which has now been mainly argued before me is, whether the indenture of the 24th \*August, 1813, having been executed by the bankrupt subsequent to his bankruptcy, can or not be received

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 1825.—Fowler v. Willoughby.
 

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as against his assignees as a declaration of trust in writing. Upon a consideration of the several cases which have been referred to in the argument, it does not appear to me that any authority has been produced which is directly in point. All the cases establish that a bankrupt cannot, by any act subsequent to his bankruptcy, transfer any interest from his assignees. Thus, a bankrupt cannot defeat the interest of his assignees by a power of appointment. Can the bankrupt be said to have any interest in this mine at the time of his bankruptcy? He might have recovered possession of this mine by force of his legal title; but he would then have recovered, not in respect of his interest, but by converting a statute, made for the prevention of fraud, into an instrument of his own fraud. It is not disputed that this deed of August, 1813, would have prevailed against the assignees, as a declaration of trust, if it had been executed before the bankruptcy. Yet a mere voluntary deed, executed before the bankruptcy, will not prevail against the assignees. This deed, therefore, in respect to the moral obligation on the trustee to give effect to his trust, would not, in such case, have been considered as a mere voluntary deed. If, in respect of the moral obligation affecting the trustee, this declaration of trust would have prevailed against the assignees if executed the day before the bankruptcy, without any other consideration, I cannot find a principle why it should not prevail against the assignees, if executed the day after the bankruptcy, especially when it is considered that a trust does not pass by assignment in the bankruptcy. For these reasons, I am of opinion that the indenture of 24th \*August, 1813, though executed after the bank- [\*354] ruptcy, is a good declaration of trust in favor of J. Rowe, within the statute of frauds. It has been slightly argued that the letters of the bankrupt do manifest a trust in writing within the statute of frauds; and further, that a trust in this case is to be implied from the fact that Rowe actually directed the working of the mine, and paid the expenses of it; but I do not think it necessary to give any opinion on these points. The bill must therefore be dismissed, and with costs.

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 FOWLER v. WILLOUGHBY.

 1825, 11th July.—*Demonstrative legacy.*

A pecuniary legacy, directed to be paid by the sale of an estate, which the testator had contracted to purchase, is payable out of the testator's general assets, if the contract cannot be completed.

IN July 1803, two gentlemen, of the name of Franklin, contracted with Lord Brownlow and Mr. Sibthorpe, for the purchase of certain real estates, their joint property, for the sum of 20,000*l*.

After entering into this contract, Messrs. Franklin agreed to sell various portions of the estates to other individuals; and, amongst others, by an agreement, dated in March 1804, they agreed to sell one portion to Thomas Wil-

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1825.—Fowler v. Willoughby.

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loughby, the testator, mentioned in the pleadings. Lord Brownlow and Mr. Sibthorpe agreed, as to the portion purchased by the testator, to execute conveyances to him, which were to be delivered as escrows. Part of the purchase money was paid by the testator, and he was let into possession.

In 1805, Lord Brownlow, having been informed that Messrs. Franklin [\*365] were unable to complete their contract, \*directed the seals to be cut off the conveyance to the testator; and the contract was considered at an end.

Messrs. Franklin, however, after this, filed a bill against Lord Brownlow and Mr. Sibthorpe, for a specific performance of the agreement. But, it appearing, at the hearing of the cause in 1808, that a commission of bankrupt had issued against them, though it had not been prosecuted, the bill was dismissed by the decree.

In 1805, pending the suit, the testator died. By his will he gave to trustees a sum of 1,400*l.*, to be raised by the sale of the estate in question, describing it as the estate which he had lately purchased of Mr. Thomas A. Franklin, upon trust to place the 1,400*l.* out upon good security; and, out of the interest thence arising, to maintain and educate his grandson, John Fowler, until he should attain the age of twenty-one years; and, when he should attain that age, he willed that his grandson should receive 800*l.* as his share of the 1,400*l.* And he gave to his grandson, Thomas Fowler, when he should attain the age of twenty-one years, the remaining sum of 600*l.*, and all the interest and profits which should have arisen from the 1,400*l.* over and above the maintenance and education of his grandson John Fowler: and he gave all the residue of his personal estate to his son Thomas Willoughby, whom he appointed sole executor of his will.

In 1810, the father of John and Thomas Fowler (who were then infants) filed a bill on their behalf, claiming the 1,400*l.*, against Thomas Willoughby, who insisted that, as the purchase of the estate out of which the money [\*356] was to be raised had not been completed, the \*1,400*l.* was not due.

But an agreement was entered into between the father and Thomas Willoughby, by which 200*l.* was paid to the father, on behalf of the infants, in satisfaction of all their claims.

The father afterwards became insolvent; and John Fowler, having come of age, joined with his brother, who was then an infant, in filing this bill against Thomas Willoughby and the trustees.

When the cause came on to be heard, it was referred to the master to inquire whether the contract of the testator for the purchase of the estate could be enforced against his assets.—The master reported in the affirmative, and the defendants took an exception to the report, which exception the court allowed, holding that the contract could not be enforced.

The cause now came on for further directions: and the question was, whether the legacy to John Fowler could take effect, although it could not be raised in the manner directed by the testator.

1825.—Smith v. Cowdery.

Mr. Agar, and Mr. Duckworth, for the plaintiffs:—The doctrine laid down in *Savile v. Backett*(a) is quite applicable to this case. Here is a gift of a sum of money, and a particular fund mentioned out of which the testator desires the legacy to be paid; but Lord Macclesfield held that, in such a case, the failure of the fund or modus mentioned by the testator is no reason why the substantive gift of the legacy should fail. *Whittaker v. Whittaker*(b) is to the same effect; for it \*was held that a contract, for the purchase [\*357] of an estate which the testator devised to his nephew, failing, the amount agreed to be paid for it should be laid out in the purchase of other lands, for the benefit of the devisee. Lord Eldon has recognized the same doctrine in *Broome v. Monck*.(c)

Mr. Horn, and Mr. Neggison, for the defendant Willoughby:—This is not a general legacy, but is so far specific as to depend entirely on the fund out of which the testator directs it to be paid. *Page v. Leapingwell*(d) proves that the gift of a certain sum of money, to be raised by the sale of an estate, is a specific legacy.—*Whittaker v. Whittaker* has no application to this case. The question there was entirely upon the will, and there was a clear intention to give an estate of a particular value to the object of the testator's bounty. The general intention of the testator was answered by laying out the sum which he mentioned in the purchase of any estate; and the testator directed his trustees and executors to take that sum out of his general assets, and apply it in the purchase of the estate. But in this case there is no direction to raise a single shilling for the purchase. No directions are given as to what should be done in case the contract was not completed. It is *casus omissus* by the testator, and what happens to legatees every day, who lose the bounty intended for them, either by the want of funds, or by the failure of the event on which the gift was made to depend. There being nothing in the will which can make \*this 1,400*l.* a charge upon [\*358] the general assets, it must fail.

Mr. Parker, for another defendant.

The Vice-Chancellor decreed the legacy to be paid out of the testator's general estate, stating, that this was neither a *legatum nominis*, nor a *legatum debiti*, but a pecuniary legacy with a particular security, which in the civil law was termed a demonstrative legacy, and that our law followed the civil law in giving effect to such a legacy, where the particular security intended by the testator happened to fail.

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SMITH v. COWDERY.

1825, 18th June, 12th July.—*Will.*—*Condition in restraint of marriage.*

Bequest to M. on the day of her marriage with any other person than T., and if she married T. then over. M. married T. in the lifetime, and with the consent of the testator; held that she was entitled to her legacy.

(a) 1 P. W. 777.

(b) 4 Bro. C. C. 31.

(c) 10 Ves. 597.

(d) 18 Ves. 463.

1825.—Smith v. Cowdery.

WILLIAM YOUNG, by his will, dated the 29th of May 1792, after giving several legacies, gave all the rest, residue and remainder of his moneys, securities for money, stock upon his farms, goods, chattels, real, personal estate and effects, unto his executors, upon trust to pay and divide the same unto and amongst his children, Susannah, the wife of James Neeld, Mary Young, Ann Young, Fanny Young, and William Young, equally between them, share and share alike, when they should respectively attain the age of twenty-one years, or day of marriage, whichever should first happen, and the interest thereof respectively, or so much as might be necessary, to be, in the mean

time, applied towards their support and maintenance, except  
 [\*359] \*Mary Young, whose share of the residue of his personal estate and effects the testator directed should be paid her upon the day of her

intermarriage with any other person excepting Henry Twynam, and the interest thereof, in the mean time, to be applied towards her support and maintenance: and his will and mind was that, in case Mary Young should at any time thereafter intermarry with Henry Twynam, then upon trust to pay and divide her share of the residue of his personal estate, so given and bequeathed to her as aforesaid, unto and amongst Susannah Neeld, Ann Young, Fanny Young, and William Young, in such manner as before and after directed concerning the residue of his personal estate: and it was also his will and intention that, in case Susannah Neeld should not leave any issue at the time of her decease, then his executors should place out at interest the whole of her share of the residue of his estate and effects, and pay the interest and proceeds thereof to James Neeld and Susannah Neeld for their natural lives, and the life of the longest liver of them; but in case Susannah Neeld should, at any time after his decease, have issue, then that his executors should pay and deliver unto her, her share of the residue of his personal estate and effects; and, after the decease of the survivor of James Neeld and Susannah Neeld (she dying without issue as aforesaid,) then that they should pay and divide her share of the residue of his estate and effects unto and amongst Mary Young, Ann Young, Fanny Young, and William Young, in like manner as the residue of his personal estate was thereinbefore and thereafter directed

to be paid and divided; and, in case any or either of them, Susannah  
 [\*360] Neeld, Mary Young, \*Ann Young, Fanny Young, and William Young,

should happen to die without issue lawfully begotten, before his, her or their respective legacy or legacies, share or shares, should become due and payable, then that his executors should pay and divide the legacy and legacies, share and shares of him, her or them so dying, unto and amongst the survivors of Susannah Neeld (in case she should have any issue as aforesaid,) but if not, he directed the interest of her share of the part or parts, share or shares of him, her or them so dying, to be paid to James Neeld and Susannah Neeld, for their natural lives, and the life of the longest liver of them, and the principal thereof, in such manner as her share of the residue of his personal estate and effects was before directed, to Mary Young, in case she should not

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at any time thoreafter intermarry with Henry Twynam, Ann Young, Fanny Young and William Young, in equal proportions, share and share alike, and if but one, then the whole to such survivor; but in case any of them should die before his, her or their legacy or legacies, share or shares should become due and payable, leaving issue lawfully begotten, then that his executors should pay and divide the legacy or legacies, share or shares of him, her or them so dying, unto and amongst the children of him, her or them so dying equally between them, share and share alike, and if but one, then the whole to such only child.

On the 1st of June 1795, the testator died. After the date of the will, but in the testator's lifetime, and with his consent, Mary Young married Henry Twynam; and the only question in the cause was, whether she thereby forfeited her share of the testator's residuary estate.

\*Mr. Agar, Mr. Horns, Mr. Romilly, Mr. Ching, and Mr. Jacob, [\*361] for the parties who were interested in contending for the forfeiture:—

Upon the plain construction of this will, it is clear that Mrs. Twynam cannot be entitled to any share of the residue. There is a condition annexed, in express terms, to the bequest to her; and it cannot be disputed that the terms of the condition apply as well to a marriage in the testator's lifetime, as to one after his death. The time of payment cannot arrive; for, unless Mrs. Twynam married with some other person than Henry Twynam, she was not to be paid her share. A will cannot be altered by matter *in pais*. The consent given by the testator cannot have the effect of striking out a clause in the will, and inserting another in lieu of it. No matter *dehors* the will can introduce a new bequest, or strike out an express gift in the will. A will cannot be revoked otherwise than by writing, unless by some act which changes the nature of the testator's interest in the substance of the gift, such as his marriage, and the birth of a child.

Mr. Sugden, and Mr. Treslove, for Mr. and Mrs. Twynam:—The court has struggled, in similar cases, to hold the condition dispensed with, where the marriage was had with the father's consent. *Clerke v. Berkeley*, (a) *Crommelin v. Crommelin*. (b) There the Lord Chancellor says: "Her claim would have been upon the ground that all these provisions were upon the supposition that they were unmarried, and in order to provide suitable \*marriages for them. Her claim would have been that she had mar- [\*362] ried, and that the consent of the trustees was quite impossible then: for there were then no such trustees in existence." *Parnell v. Lyon*, (c) is exactly this case; for it contains an express gift over in case the daughters married without the consent of the executors. *Coffin v. Cooper*. (d) In the present case no consent is required; but there is a gift over in case Mary Young married Mr. Twynam. But when the testator did away with the prohibition, and consented to and assisted in completing the act which it is contended

(a) 8 Vin. Ab. 154, S. C. 2 Vernon, 720.

(c) 1 V. &amp; B. 479.

(b) 3 Ves. 227.

(d) Cited in last case.

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worked a forfeiture, he impliedly revoked the clause. The condition is considered as ceasing when the testator has done an act which virtually strikes the clause out of the will. He was looking to a marriage after his death; and, therefore, the provisions of his will cannot be applied to one solemnized in his lifetime. *Wheeler v. Warner.*(e)

The court is authorized to hold a will to be revoked by circumstances extrinsic to the will; because its decisions with respect to legacies are regulated by the civil law, and the civil law holds that such circumstances may effect a revocation. Upon this principle it has been decided that marriage and the birth of a child are sufficient to revoke a bequest. The earliest case in which this was decided was *Lugg v. Lugg.*(f) There the delegates held that, there being such an alteration in the testator's estate, and circumstances so different at the time of his death from what they were when he made the will, [\*363] there was room and presumptive evidence to believe a revocation, and that the testator continued not in the same mind. In *Doe v. Lancashire,*(g) Lord Kenyon, C. J., states the foundation of the principle to be, not so much an intention to alter the will, implied from those circumstances happening afterwards, as a tacit condition, annexed to the will itself at the time of making it, that the party does not then intend that it should take effect, if there should be a total change in the situation of his family. Here the testator, at the time of making his will, opposed the marriage: but afterwards altered his mind and promoted it. It is no violation of the expressions of the will to hold Mrs. Twynam entitled to a share of the residue; for the testator gives it over in case she should at any time thereafter intermarry with Henry Twynam. Now the will speaks at the death of the testator, and the marriage took place before that event, therefore the gift over could not take effect.

Mr. *Heald*, and Mr. *Roupell*, for other parties.

The VICE-CHANCELLOR:—The testator in this case introduces a condition in his will to prevent the marriage of his daughter Mary with Henry Twynam. After the making of his will his daughter Mary married Henry Twynam, with his express consent and approbation; and the condition is thus dispensed with. In coming to this conclusion, I follow the cases of *Clerke v. Berkeley*, *Crommelin v. Crommelin*, and *Parnell v. Lyon*. In this case [\*364] it is very questionable, whether, under the language of the will, the share of the testator's daughter Mary did not vest absolutely at twenty-one, without regard to marriage; but it is not necessary to pursue that point.

(e) Ante, 1st vol. 304.

(f) 2 Salk. 592. S. C. 1 Ld. Ray. 441.

(g) 5 T. R. 49. See also *Brady v. Cubitt*, Doug. 30.

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1825.—Wigsell v. Wigsell.

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## WIGSELL v. WIGSELL.

1825, 1st and 19th July.—*Tenant in tail.*

Tenant in tail in remainder (after estates to A. for life, and to his first and other sons in tail) pays off a mortgage during the life of the tenant for life, takes an assignment to himself of the mortgage term, and afterwards comes into possession of the estate, and dies without issue: the mortgage is a subsisting charge for the benefit of his personal estate, there being no act to show a contrary intention.

In the year 1773, Thomas Wigsell, being seised in fee-simple of certain real estates, mortgaged them for a term of 2,000 years, to secure 1,000*l.* and interest.

By his will, dated in 1774, he devised his real estates to trustees, for a term of 500 years, upon trust to raise money for payment of his debts and of a sum of 1,500*l.* to Susannah Wigsell, on her marriage; and, subject thereto, he devised the estates to Atwood Wigsell for his life, with remainder to the first and other sons of Atwood Wigsell in tail; with remainder to Thomas Wigsell, the younger, for his life; with remainder to his first and other sons in tail; with remainder to Susannah Wigsell, and the heirs of her body; with remainder to his own right heirs.

The testator died in 1778; and his will was proved by Atwood Wigsell the sole executor, who entered into possession of the real estates, as tenant for life under the will.

Atwood Wigsell made his will in 1795, and died in the same year without issue. Thomas Wigsell, the younger, his brother, and sole executor, proved his will, and entered into possession of the real estates, as tenant for life.

\*In 1797, Thomas Wigsell, the younger, being the heir at law of [\*365] Thomas Wigsell, and, as such, seised of the reversion in fee of the real estates, expectant on the death of himself and Susannah Wigsell without issue, concurred with Susannah Wigsell in executing a settlement of the real estates on himself for life, with remainder to his first and other sons in tail, with remainder to Susannah Wigsell in tail, with remainder to trustees, for a term of 5,000 years, to raise 1,000*l.* and pay it to Susannah Wigsell, in discharge of the like sum due to her by Thomas Wigsell, the younger, on his bond, with remainder to the daughters of Thomas Wigsell, the younger, as tenants in common in tail, with remainder to Atwood Wigsell Wigsell for life, with remainder to the first and other sons of A. W. Wigsell in tail, with divers remainders over.

On the 3d of July 1805, during the lifetime of Thomas Wigsell, the younger, Susannah Wigsell paid off the 1,000*l.* due on the mortgage created by T. Wigsell, the elder, and, by an indenture of the same date, reciting that Thomas Wigsell, the younger, having been applied to by the mortgagees, but being unable to pay the 1,000*l.* Susannah Wigsell had paid it at his desire, the mortgage term of 2,000 years was assigned to Susannah Wigsell.



1825.—Wigsell v. Wigsell.

In September 1805, Thomas Wigsell, the younger, died without issue. Upon his decease his widow, who was also his personal representative, entered into possession of a part of the estates comprised in the mortgage, which her husband had, in the year 1795, settled on her, for her jointure, under a power contained in the will of T. Wigsell, the elder, and Susannah Wigsell [\*366] entered into possession of the rest of the estates as \*tenant in tail, and continued in possession thereof till sometime in 1806, when she died, without ever having been married. By her will dated in November 1805, she gave all her personal estate to her executors, for the benefit of Atwood Wigsell Wigsell.

Upon Susannah Wigsell's death, Atwood Wigsell Wigsell entered into possession of the estates, not comprised in the jointure, as tenant for life under the settlement of 1797; and, in 1821, he died, having, by his will, bequeathed all his personal estate to the plaintiff, his widow.

The bill charged that the 1,000*l.* had never been called in by Susannah Wigsell, and prayed that it might be declared to be a subsisting charge upon the estates, and that the plaintiff was entitled to it as part of Susannah Wigsell's personal estate, which was bequeathed to her husband.

The widow of Thomas Wigsell, the younger, who was one of the defendants, by her answer, insisted that the term of 2,000 years, assigned to Susannah Wigsell, had merged in the inheritance, which had become vested in her in possession; and that Susannah Wigsell had never, after the death of Thomas Wigsell, the younger, made any claim upon the defendant, in respect of the interest of the 1,000*l.*, which had been charged upon part of her jointure lands, although a full settlement of all accounts between them had been made; nor did her executors ever make any such claim until a short time before the bill was filed; and that Susannah Wigsell was not only tenant in tail, [\*367] but, under the settlement of 1797, had an absolute \*power over the whole fee-simple, by means of a power of revocation and new appointment, which she had, in fact, exercised, by altering certain of the limitations in that settlement, on failure of the issue of Atwood Wigsell Wigsell.

The cause now came on to be heard.

Mr. Roupell, and Mr. R. Roupell, for the plaintiff:—There could be no merger in this case, on account of the term of 500 years, which intervened between the mortgage term and the limitation of the inheritance to Susannah Wigsell. In cases of this kind the court always looks to the intention. *Forbes v. Maffatt*(a) establishes the rule, not only that the intention of the party must govern, but that the advantage of the personal representative is to weigh with the court. *Thomas v. Kemish*(b) is to the same effect.

Mr. Sugden, and Mr. Pemberton, for the widow of Thomas Wigsell, the younger:—In order to judge of the intention in this case, the court must consider the situation of the parties. If it makes no difference whether the estate or the charge first vests, it is difficult to see how it can be made out that this

(a) 18 Ves. 384.

(b) 2 Vern. 348.

1825.—*Wigzell v. Wigzell.*

charge subsisted after the inheritance became vested in Susannah Wigzell. The situation in which she stood at the time when the term was assigned to her, was such as made it clearly for her interest to keep the charge alive during the lifetime of Thomas Wigzell, the younger, who was then tenant for \*life of the estates. If she had not done so, she would [\*368] have lost the interest of the 1,000*l.* during the subsistence of his life estate. But, from the moment when the inheritance became vested in her, it became a matter of indifference whether the term was kept alive or not. She had concurred with Thomas Wigzell, the younger, in making a settlement of the estate on Atwood Wigzell Wigzell: and that settlement was made, reserving a power of revocation to Susannah Wigzell. Was it then a probable intention on her part that the personal representative should diminish the estate by raising the amount of this charge out of it? In *Thomas v. Kemish* the tenant in tail died an infant, in which case the rule of the court always is, to consider that the infant intended to keep the charge alive.

Mr. Roupell, in reply:—Susannah Wigzell, though she was tenant in tail, never suffered any recovery; and, not having done so, it is clear that she did not intend to make the estate her own. There is as much evidence of intention in this case, as in those in which the court has held that the charge was not in equity extinguished. *Duke of Chandos v. Talbot*, (c) *Wyndham v. Lord Egremont*, (d)

Mr. Longley, and Mr. Daniell, for other defendants.

The VICE-CHANCELLOR:—This bill is filed for the purpose of having it declared that the plaintiff, as representing A. W. Wigzell, deceased, is entitled to have a sum of 1,000*l.* and \*interest raised by sale or [\*369] mortgage of the estate in question in this cause.

Susannah Wigzell, being tenant in tail in remainder of this estate, expectant upon the death of her brother, Thomas Wigzell, and failure of his issue, during the life of Thomas Wigzell, paid off an old mortgage of 1,000*l.* due upon this estate, and took an assignment of the mortgage term to herself. Thomas Wigzell afterwards died without issue, and Susannah became tenant in tail in possession, and afterwards died without issue, and without having suffered a recovery; and the question is, whether the mortgage of 1,000*l.*, which she so paid off, did not, at her death, constitute part of her personal estate.

Where a tenant in tail in possession pays off a mortgage, and declares no intention that the charge shall continue for the benefit of the personal estate, there the charge ceases; because the estate is considered as his own, inasmuch as he may make it his own by suffering a recovery. This principle has no application to a tenant in tail in remainder whose estate may be altogether defeated by the birth of issue of another person; and it must be inferred that such a tenant in tail means to keep the charge alive.

When Susannah Wigzell, therefore, became tenant in tail in possession, this

(c) 2 P. W. 601.

(d) Amb. 753.

1825.—*Hine v. Fiddes.*

charge subsisted as a part of her personal estate; and, not having afterwards declared any intention to the contrary, I am of opinion that it continued part of her personal estate at her death, and that the plaintiff is entitled to the relief which she prays.

[\*370] \*This case has been partly argued on the ground of merger; but merger is out of the question here, because of the intermediate estate.(c)

### HINE v. FIDDES.

18th July.—*Practice.—Injunction.*

Special injunction granted to stay proceedings in an action in the court of common pleas at Lancaster.

THIS was a motion for a special injunction, to restrain the proceedings in an action brought by the defendant against the plaintiff, in the court of common pleas at Lancaster. The bill was filed on the 11th instant. The affidavit in support of the motion verified the contents of the bill, and stated, amongst other things, that, on or about the 25th of June last, the plaintiff had been arrested, by virtue of a writ of *capias*, issued, at the defendant's suit, out of the court in question, returnable on the 6th instant; that a declaration had been filed in the action, and notice of it served on the plaintiff; and that, according to the practice of the court, the plaintiff was bound to plead to the declaration within eight days from the filing of it; and that the cause would stand for trial at the Lancaster assizes, to be held on the 15th of August next.

Mr. Koe, in support of the motion, referred to the 39th and 40th Geo. III, c. 105, and said that, regard being had to the time at which the action had been commenced and the seal-days of this court, it was impossible for the plaintiff to obtain the common injunction before the trial of the action; and that no suit could have been instituted in the court of chancery at Lancaster so as to stay the proceedings. On these grounds the Vice-Chancellor granted the injunction.[1]

[\*371] \*The defendant had been served with notice of the motion, but did not appear.

### BOLTON v. BOLTON.

1825, 16th July.—*Practice.*

A bill of revivor having been filed, but no order to revive obtained, the court ordered the plaintiff to revive within ten days, or both the original bill and bill of revivor to be dismissed.

(c) See *Drinkwater v. Combs*, ante, 340.

[1] Vide *Jones v. Bassett*, 2 Russ. 405; *Drummond v. Pigou*, 2 Mylne & Keene, 168; *Frank v. Bassett*, 2 Mylne & Keene, 618.

1825.—Hibberson v. Fielding.

THE plaintiff had filed a bill of revivor, but had neglected to obtain an order to revive.

Mr. *Koe*, on behalf of the defendant, now moved that the plaintiff might revive the suit within ten days, or that both the original bill and bill of revivor might stand dismissed. He cited *Adamson v. Hall*, (a) and *Atkis v. Wynne*, 10th August, 1805; in which latter case, the defendant alleging that a bill of revivor had been filed, but no order to revive obtained by the plaintiff, the court ordered that the plaintiff should revive within a limited time, or both bills be dismissed.

The Vice-Chancellor made the order.[1]

### HIBBERSON v. FIELDING.

1825, 8th and 26th July.—*Practice.—Costs.*

An order obtained by a defendant to a bill of discovery, for payment of his costs, is regular, although the plaintiff had previously become bankrupt.

THE bill was filed for a discovery, in aid of an action at law. There was only one plaintiff. The defendant had put in his answer. On the 18th of June, a commission of bankrupt was issued against the plaintiff, under which he was declared a bankrupt. On the 28th of the same month, the defendant obtained the usual order for payment of his costs.

\*Mr. *Pemberton* now moved to discharge that order, for irregu- [\*372] larity, and contended that the suit was, in effect, abated.

Mr. *Spence* opposed the motion.

The Vice-Chancellor refused the motion; and said that the bankruptcy of the plaintiff could not defeat the defendant's right to the order: but that it might be a question between the bankrupt and his assignees whether the estate should not pay the costs.

### ELWORTHY v. BIRD.

1825, 29th June; 26th July.—*Husband and Wife.—Specific performance.*

This court will decree specific performance of an agreement for separation between husband and wife, although the agreement was made on a compromise of indictments, preferred by the wife against the husband and others, for assaults on her.

It is not illegal to compromise indictments for a misdemeanor; *secus*, as to indictments for felony.

(a) 1 Turn. 258.

[1] Vide *Troward v. Bingham*, 4 Sim. 483.

1825.—*Elworthy v. Bird.*

THE question in this cause was, whether the court would decree a specific performance of an agreement for a separation between a husband and wife. The plaintiffs were the wife and her father and brother.

The bill stated that the marriage between the defendant and the plaintiff, his wife, took place in 1811; that they continued to reside together for some time; that the defendant, without any provocation, had treated his [\*373] wife with such harshness and cruelty, that, in the month of July, 1821, she was compelled to leave him, and removed to the house of her father; that the defendant, upon that occasion, agreed to allow her 50*l.* a year for her maintenance, and gave directions to his attorney to prepare an agreement in writing for that purpose; that the attorney, accordingly, prepared a draft of such agreement, but that it was never engrossed, and the defendant afterwards refused to pay the annuity, or allow his wife any sum for her support, whereby she was reduced to great distress; that, in February, 1822, she returned to her husband, who treated her with increased cruelty, confined her in a dark and unwholesome room, and not only beat her himself, but caused his workmen and apprentices to beat and maltreat her; that, by the interference of the plaintiffs, (her father and brother,) an order was obtained from a magistrate for releasing her from confinement, and the defendant was bound over to keep the peace towards her, and indictments were preferred against him and his workmen and apprentices for the assaults committed by them upon her; that the indictments stood for trial at the general quarter sessions in July, 1822; that the indictment against the defendant was first tried, and, the case being fully proved against him, he was found guilty; that, upon the verdict being returned, the justices expressed their opinion that, under the circumstances, it would be best that the disputes and differences between the parties should, in some manner, be accommodated; that, in consequence of this recommendation, a conversation took place, between the counsel and attorney of the plaintiffs and the counsel and attorney of the defendant, with the view of effecting an arrangement, and, in a short time, with the authority and consent of the plaintiffs and the defendant, they [\*374] came to an agreement, which was reduced into writing and signed by the counsel on each side, on behalf of their clients, and was as follows:—

*“ Rex against William Bird.*

“ Upon a verdict of guilty in this case, a nominal fine was, by consent of the prosecutrix, imposed on the defendant, 1822, July 18th, it being agreed that a deed of separation shall be executed by Mr. and Mrs. Bird and Thomas Elworthy, the father of Mrs. Bird, and William Elworthy, her brother, who shall be trustees on her behalf, by which 50*l.* a year, for her life, payable quarterly by said Mr. Bird, shall be sufficiently secured to Mrs. Bird, to commence 1st day of January 1821, the arrears of which to be paid by the said Mr. Bird, and also covenants from Thomas Elworthy, the father of Mr. Bird, and William Elworthy, the brother, to indemnify the said William Bird against

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the debts of Mrs. Bird, and that Mr. Bird shall not be molested by her. All actions and indictments which have been brought and preferred, and which are still pending for any matter or thing done or said by Mr. and Mrs. Bird, or either of them, or by their respective relations and servants, or any or either of them, relating to or connected with the conduct either of Mr. or Mrs. Bird, and all actions now pending against any other person for criminal conversation with Mrs. Bird, shall be discontinued; and that no further actions shall be brought, or proceedings had, for or on account of any thing done or said to or by the said Mr. and Mrs. Bird, or their respective families or servants, up to and including the date of this agreement."

The bill then stated that the substance of this \*agreement was com- [\*375] municated to the justices, who approved of it, and, in consequence, sentenced the defendant to pay a fine of one shilling only, and ordered the trials of the other indictments to be respited; that, in pursuance of the agreement, the plaintiffs discontinued the prosecution of the other indictments, and the defendants to them had in consequence been acquitted; that the plaintiffs had, in all other respects, performed the agreement on their parts, and had caused a draft of a deed to be prepared pursuant to it; but that the defendant refused to perform the agreement, or to execute a proper deed for securing the annuity of 50*l.*, or to pay the arrears of it, although the plaintiffs had offered, upon his executing a proper deed, to give him an indemnity against the debts of his wife, pursuant to the agreement.

The bill charged various facts, as to the conduct of the defendant, tending to show that he had recognized the agreement, and that it was duly signed on his behalf; that it was duly obtained from him; that the terms of it were, in all respects, fair and reasonable; that the amount of the annuity bore only a small proportion to the amount of the defendant's property and income; that the wife would, on account of his conduct, have been entitled to a sentence of divorce or separation from him in the ecclesiastical court, but that she had not commenced any such proceedings in consequence of the agreement; and that her father and brother had, some time since, commenced actions at law against the defendant for non-performance of the agreement, but not being prepared with proper evidence had been non-suited.

The prayer of the bill was, for the specific performance of the agreement for a separation; for an account \*and payment to the wife [\*376] of the arrears of the allowance of 50*l.* a year, and for the execution of a proper deed, and performance of all other necessary acts to secure the future payment of the allowance.

The defendant put in a general demurrer, for want of equity.

Mr. *Hart*, and Mr. *Richards*, for the demurrer:—

1st. The general doctrine of the court is not to decree the specific performance of agreements for separation between husband and wife. In the cases where the court has given effect to such agreements, the judges have uniformly shown themselves anxious to distinguish those particular cases as exceptions

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from the general rule. *St. John v. St. John*,(a) *Worrall v. Jacob*,(b) *Jee v. Thurlow*,(c) *Legard v. Johnson*,(d) And in all the cases in which any sanction has been given to deeds of separation between husband and wife, the instrument has been under seal. In *Binnington v. Wallis*,(e) the distinction between the effect of an instrument under seal, and a mere executory agreement not under seal, was noticed. *Durant v. Titely*,(f) and *Matthews v. L.*,(g) are cases in which the court refused to act upon agreements for separation.

2d. This agreement was made for compounding and suppressing indictments, and therefore cannot be sanctioned. It is contrary to the policy of the law to give effect to an agreement made for such a purpose. *Johnson v.*

*Ogilby*,(h) There can be no mutuality in an agreement made upon [\*377] such a consideration; for if, notwithstanding the agreement, the indictments were afterwards prosecuted, it would be impossible to restrain the proceedings; *Lord Montague v. Dudman*,(i) *Mayor of York v. Pilkington*; (k) and it would remain entirely in the discretion of the attorney-general whether he would grant a *nolle prosequi*; *Jones v. Clay*,(l) In Blackstone's Commentaries,(m) it is said that the practice of allowing parties to compromise indictments for felonies is a dangerous practice, and ought never to be allowed in local or inferior jurisdictions, such as the quarter sessions. *Collins v. Blantern*,(n) *Edgecombe v. Rodd*,(o)

Mr. *Heald*, and Mr. *Jacob*, for the bill:—

1st. It is quite established that the court will decree the specific performance of agreement for separation between husband and wife. In *Worrall v. Jacob*, which had been cited on the other side, the master of the rolls treated it as quite settled that the court would enforce such agreements. In *Fletcher v. Fletcher*,(p) the same doctrine is laid down. But the present case is much stronger, because it is one where the husband and wife are already in a state of actual separation, and were separated at the time when the agreement was made. It makes no difference whether the instrument which contains the agreement be under seal or not. In *Angier v. Angier*,(q) it does not appear that the agreement was under seal, and it would seem from some expressions in the report that it was not under seal. *Seeling v. Crawley*,(r) was also a

[\*378] case where there were mere articles of agreements. *Freeman v. Moore*,(s) is also a strong case. In *Head v. Head*,(t) where Lord Hardwicke treated it as the usual practice of the court to enforce agreements of this kind, it is material to observe that the way in which that case was argued on behalf of the husband, was, that it was an agreement only for separation during pleasure, and therefore that the court could not establish it

(a) 11 Vez. 537.

(b) 3 Meriv. 256.

(c) 2 Barn. &amp; Cress. 547.

(d) 3 Vez. 352.

(e) 4 Barn. &amp; Ald. 650.

(f) 7 Price, 577.

(g) 1 Madd. 558.

(h) 3 P. W. 279.

(i) 2 Vez. 396.

(k) 2 Atk. 302.

(l) 1 Bos. &amp; Pull. 191.

(m) 4th Vol. 363.

(n) 2 Wils. 347.

(o) 5 East, 294.

(p) 2 Cox, 99.

(q) Pre. Cha. 496.

(r) 2 Vern. 385.

(s) 1 Bro. P. C. 287.

(t) 3 Atk. 295, 547.

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against the husband, and that Lord Hardwicke's judgment proceeded upon that view of the case. *Yeo v. Yeo*(u) is a strong instance of the countenance given by this court to suits for the performance of articles of separation. *Lambert v. Lambert*(v) is also a strong authority. In *Bateman v. Ross*(w) one of the objections was, that the agreement was between husband and wife, and therefore *nudum pactum*; but Lord Redesdale and Lord Eldon both seemed to entertain no doubt on that question, and affirmed the judgment. And in *Tovey v. Lindsay*(x) a separation by deed was held, by the house of lords, to have the effect of changing the domicile of the wife. In *Cooke v. Wiggins*(y) the trustees under a bond for separate maintenance, declining to sue the husband, this court made a decree for the payment. In *Worrall v. Jacob*, unless Sir Wm. Grant had felt satisfied that there was a sufficient consideration, he would not have decreed a specific performance; for it is settled that the court will not decree a specific performance of a mere voluntary agreement; *Sutton v. Chetwynd*(z). In *Scholey v. Goodman*(a) no objection was taken as to want of sufficient consideration. In the present case there is a better consideration to support the agreement than is\* to be found [\*379] in most cases of this description; for it appears that the defendant has used his wife in such a way as to subject him to indictments, and to proceedings in the ecclesiastical court for alimony. In *Hebbs v. Hull*(b) that was held to be a sufficient consideration to support the allowance for separate maintenance against the husband's creditors; and the same thing was decided in *Nunn v. Wilmors*(c). *Guth v. Guth*(d) is a case in which specific performance of such an agreement was decreed, although the husband, by his answer, offered to receive back his wife.

2d. It is no objection to the performance of this agreement that part of the consideration was compounding the indictments, which were for a mere private misdemeanor. It would have been different if it had been compounding a prosecution for felony; or even for a public misdemeanor. Not to prosecute a felony is misprision of felony, but the law makes a distinction between public and private misdemeanors, by allowing the latter to be compromised after verdict and before sentence. Many of the rules applied to civil proceedings are applicable to indictments for private misdemeanors. *Beeley v. Wingfield*(e) is an authority to show that a sum agreed to be paid as a compromise for a private misdemeanor, where the compromise was made with the sanction of the tribunal before which the prosecution was instituted, may be recovered in an action at law. *Rex v. Fielding*(f) *Mayor of York v. Pilkington*(g). In *Edgcomb v. Rodd*(h) Mr. Justice Le Blanc takes the distinction expressly between a public and a \*private misdemeanor. In *Roy v. Duke* of [\*380] *Beaufort*(i) a bond was given by a party under prosecution for an offence

(u) 2 Dick. 498.

(y) 10 Ves. 191.

(c) 8 T. R. 521.

(g) 2 Atk. 302.

(v) 2 Bro. P. C. 18.

(z) 2 Meriv. 249.

(d) 3 Bro. C. C. 614.

(h) 5 East, 294.

(w) 1 Dow. 235.

(a) 1 Bing. 349.

(e) 11 East, 46.

(i) 2 Atk. 290.

(x) 1 Dow. 131.

(b) 1 Cox, 445.

(f) 2 Burr. 719.



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against the game laws, and although the bond was relieved against, on the ground of oppression, it would seem, from what is said by Lord Hardwicke, that it was considered as no objection to the bond that it was given in consideration of stopping the prosecution. In *Elworthy v. Bird*,<sup>(k)</sup> where this same case was before the court of exchequer, on an action of assumpsit on the agreement, the plaintiffs were nonsuited merely because the agreement was not proved; and Baron Hullock, so far from treating such an agreement as illegal, pointed out the proper course of proceeding to make it available. In *Johnson v. Ogilby*, which has been cited on the other side, Mr. Peere Williams took the distinction between the compromise of a felony and of a private misdemeanor, and the court seems to have adopted it, as the bill was dismissed. *Fallowes v. Taylor*<sup>(l)</sup> is a case in which it was held that a bond, given in consideration of refraining from a prosecution for a public nuisance, was held good in law. *Brett v. Close*.<sup>(m)</sup> The agreement in the present case was made subject to the approbation of the court in which the indictments were pending. That court was itself a party to the agreement. All the other indictments were before that court, which was consulant of all the circumstance of the case, and thought those other indictments should not be prosecuted.

*Drage v. Ibberson*<sup>(n)</sup> is a case in which it was decided that a note [<sup>\*381</sup>] given for the compromise of a \*misdemeanor may be recovered at law; and Lord Kenyon there alluded to the distinction between the compromise of felonies and private misdemeanors, as established by Lord Talbot in *Johnson v. Ogilby*. In Kydd on Awards, 2d edit. 66, a case is mentioned in which there were several indictments for conspiracy and perjury, and after the trial of the first indictment Lord Kenyon directed an arbitration. If that was right in a case of perjury, surely the justices must have been right in directing the compromise in the present case. In *Baker v. Townsend*,<sup>(o)</sup> it was decided, expressly, that it was legal to refer to arbitration indictments for assaults. Indeed, it would be very difficult to hold that compounding assaults was illegal, as nothing is more common than where a party was brought before a magistrate, for him to recommend a compromise.

The VICE-CHANCELLOR:—In support of this demurrer two grounds have been taken:—first, that this court will not carry into execution articles of separation between husband and wife: secondly, that the agreement sought to be executed is illegal, because it provides that a nominal fine only shall be imposed upon the husband, who had been convicted, upon an indictment, for an assault upon the wife, and because it provides also that indictments, which have been found against the workmen and apprentices of the husband for assaults upon the wife, should be discontinued.

As to the first ground, inasmuch as these articles contain an engagement, on the part of the father and the brother of the wife, to indemnify the husband from the debts of the wife in consideration of the husband's [<sup>\*382</sup>] \*stipulation to pay the wife an allowance of 50*l.* a year for her life,

(k) 13 Price, 222. (l) 7 T. R. 475. (m) 16 East, 393. (n) 2 Espinasse, 643. (o) 7 Taunt. 422.

1825.—*Statham v. Hughes.*

there can be no question that this court will enforce that stipulation against the husband.[4] And, as to the second ground, all the authorities concur that the policy of the law does permit the compromise of indictments for assaults, and such compromises are frequently recommended and approved by the court, and the bill alleges that such was the fact in the present instance.

Demurrer overruled.

STATHAM V. HUGHES.

1825, 29th July.—*Practice.—Injunction.*

Although an injunction is not applied for upon an original bill, yet, if the bill is afterwards amended, an injunction will be granted, as of course, upon the defendant taking an order for time to answer the amended bill.

THE bill prayed for an injunction to stay proceedings at law; but no injunction was obtained, or even applied for. After the answer was put in, the bill was amended. The defendant then took an order for time to answer the amended bill; upon which the plaintiff obtained an order for the common injunction.

The defendant now moved to discharge that order, for irregularity.

The Vice-Chancellor directed the motion to stand over, in order that the practice might be inquired into; and ultimately refused the motion.

Mr. *Koe* appeared in support of the motion.

Mr. *Spence* opposed it.

\*TANIERE V. PEARKES.

[\*383]

1825, 30th July.—*Will.—Construction.*

Legacy of 600*l.* to F., and at her death to her two daughters in equal shares, and at their death to their children; one of the daughters having died without children, held that the children of the other daughter did not take the whole 600*l.*, but only their mother's share.

[1] "It is impossible for a feme covert to make any valid agreement with her husband to live separate from him, in violation of the marriage contract, and of the duties which she owes to society, except under the sanction of the court; and in a case where the conduct of her husband has been such as to entitle her to a decree for a separation. The law of the land does not authorize or sanction a voluntary agreement for separation between husband and wife. It merely tolerates such agreements when made in such manner that they can be enforced by or against a third person acting in behalf of the wife." Walworth, Ch. *Rogers v. Rogers*, 4 Paige, 516. A husband and wife may make a valid agreement for separation and allowance to the wife through the intervention of a trustee; *Simpson v. Simpson*, 4 Dana, (Kentucky,) 141. Where a bond is given by a husband to secure a separate maintenance to his wife, on an agreement between them to live separate and apart, and the wife subsequently returns to resume her duties and privileges as a married woman, and is received by her husband as his wife, the previous agreement to live separate from each other is at an end, and the bond which was given for the separate maintenance falls with the agreement; *Shelthar v. Gregory*, 2 Wend. 422; vide *Memoranda*, post, 479; *Nixon v. Hamilton*, 2 Dru. & W. 387.

1825.—*Pieschel v. Paris.*

THE question in this case was as to the construction of the following clause in a French will :—

“ Je donne ce legs a ma sœur Francoise, epouse de Monsieur Taniere de Feu, habitant a Camarde, departement de Larridge, la somme de six cents livres sterlings, une fois payee a son deces a ses deux filles, qui leur sera partagee par deux egales portions : leur epoux ne pourront en jouir qu'autant que son epouse consentira ; a leur deces a leurs enfans.”

One of the daughters of the testatrix's sister Francoise died without children, and the question was, whether the children of the other daughter took the whole 600*l.* between them.

Mr. *Treslove*, for the children, cited *Malcolm v. Martin*.(a) *Doe v. Abey*.(b)

THE VICE-CHANCELLOR :—The case of *Malcolm v. Martin* has no application here. There the grand-children took nothing till all the children were dead. Here the children of each daughter must plainly take their mother's share upon her death ; and there are no words which can carry one daughter's share either to the surviving daughter or her children.

[\*384]

\*PIESCHEL v. PARIS.

1825, 12th July ; 2d August.—*Charity*—*Jurisdiction*.

Where a testator gives a sum of stock to trustees, and shows a clear intention to dispose of the whole of the dividends for the benefit of charitable institutions, and does, in fact specify some of them, and the yearly sums to be paid to them, but leaves blanks for the names of others and for the sums to be paid to them ; the court will refer it to the master to approve of a scheme for the application of the remaining dividends.

THIS was a suit for the administration of the trusts of the will of Augustus Godfrey Pieschel.

By his will, dated the 26th of October 1820, after giving several pecuniary legacies to a large amount, he bequeathed to the president, treasurer and governors of Christ's Hospital, the sum of 1,000*l.*, upon condition that they, and their successors for the time being, for ever should distribute and pay the various annual sums after directed by him to be paid to the various charitable and other establishments in England after specified ; and, in order to provide a fund adequate to those purposes, he gave to the president, treasurer and governors of Christ's Hospital, 30,000*l.* stock, then bearing an interest of 4*l.* per cent, per ann. in the London Dock Company, commonly called London Dock Stock, upon trust, from time to time for ever thereafter, to receive and take the interest, dividends and annual proceeds of the said London Dock Stock, and pay and apply the same in manner and for the purposes thereafter mentioned, that is to say, to pay, yearly and every year for ever thereafter, the sum of 100*l.*, part of the interest, dividends and annual proceeds, to the treasurer for the

(a) 3 Bro. C. C. 50.

(b) 1 M. &amp; S. 428.

1825.—Pieschel v. Paris.

time being of the London Hospital, to be, from time to time, applied and disposed of for the benefit of the same hospital.

The will then contained similar bequests of the yearly sums after mentioned to the following charities :—\*£100, yearly, to the asylum [\*385] for the deaf and dumb ; 100*l.* yearly, to the school for the indigent blind ; 100*l.* yearly to the Middlesex hospital ; 50*l.* yearly, to the hospital for lying-in women ; 50*l.* yearly, to the society for relief of prisoners for small debts ; 50*l.* yearly, to the society for the relief of foreigners in distress ; 50*l.* yearly, to the city orphan school ; 100*l.* yearly, to the London orphan school ; 50*l.* to the St. George's Hanover-square charity school.

The will then proceeded in these words :—“ And do and shall, yearly and every year for ever hereafter, pay the sum of \_\_\_\_\_, other part of the said interest, dividends and annual proceeds, to the treasurer for the time being of \_\_\_\_\_, to be by him, from time to time, applied and disposed of for the sole use and benefit of that charity ; and do and shall, yearly and every year for ever hereafter, pay the sum of \_\_\_\_\_, other part of the said interest, dividends and annual proceeds, to the treasurer for the time being of \_\_\_\_\_, to be by him, from time to time, applied and disposed of for the sole use and benefit of that charity ; and do and shall, yearly and every year for ever hereafter, pay the sum of \_\_\_\_\_, other part of the said interest, dividends and annual proceeds, to the treasurer for the time being of \_\_\_\_\_, to be by him, from time to time, applied and disposed of for the sole use and benefit of that charity ; and do and shall yearly, and every year for ever hereafter, pay the sum of \_\_\_\_\_, other part of the said interest, dividends and annual proceeds, to the treasurer for the time being of \_\_\_\_\_, to be by him, from time to time, applied and disposed of for the sole use and benefit of that charity ; and do and shall, yearly and every year for ever hereafter, pay the sum of \*200*l.*, being the residue of the said interest, dividends and annual pro- [\*386] ceeds, to the Earl of Chichester, or to the person or persons who shall or may, for the time being, be Earl of Chichester.” The testator then directed the Earl of Chichester, for the time being, to apply 100*l.* yearly, part of such yearly sum of 200*l.*, for the poor inhabitants of Brighton, and the remaining 100*l.* for the sole benefit of the Brighton infirmary, and then expressed himself as follows : “ And I do hereby direct that the several yearly sums of 100*l.*, 100*l.*, 100*l.*, 100*l.*, 50*l.*, 50*l.*, 50*l.*, 100*l.*, 50*l.*, so hereinbefore directed to be paid, applied and disposed of for the benefit of the said several charities, respectively, as aforesaid, shall, respectively, be annually paid to the respective treasurers for the time being of such charities, respectively, at the respective usual anniversary dinners of the same charities respectively, and at which anniversary dinners respectively, or some of them, William Frederick Duke of Gloucester and Edinburgh has usually presided. But in case, in any year or years, there shall be no anniversary dinner or dinners of all or any, one or more of the said several charities respectively, then and in such case the annual sum or sums hereinbefore directed to be paid, applied and disposed of for the benefit of such

1825.—Pieschel v. Paris.

of the said charities, whereof there shall be no such anniversary dinner or dinners respectively, shall be paid to the treasurer or respective treasurers thereof, respectively, at the period or time of the year, or respective periods or times of the year, when the general annual collection or collections for the same charity or charities, respectively, shall take place; the first annual payment of such annual sums of 100*l.*, 100*l.*, 100*l.*, 100*l.*, 50*l.*, 50*l.*, 50*l.*, [\*387] 50*l.*, 100*l.*, 50*l.*, to begin to be made at the several and respective \*an-

niversary dinners, or at the respective times of the several and respective general anniversary collections, as the case may be, which shall first and next happen after my decease respectively. And I hereby further declare my will to be, that, in case the dividends, interest and annual proceeds of the said London Dock Stock, hereinbefore given and bequeathed to the said president, treasurer and governors for the time being of Christ's Hospital aforesaid, upon the trusts aforesaid, shall, at any time or times, be more than sufficient to pay the said several sums of 100*l.*, 100*l.*, 100*l.*, 100*l.* 50*l.*, 50*l.*, 50*l.*, 50*l.*, 100*l.*, 50*l.*,

amounting together to the annual sum of 1,000*l.*, then, and in such case, the surplus of such interest, dividends and annual proceeds shall, from time to time, be divided into two equal moieties, and one moiety thereof shall be paid to or retained by the president, treasurer and governors for the time being of Christ's Hospital aforesaid, for the benefit of the same institution, nevertheless subject to such and the like conditions as are hereinbefore contained with respect to the said sum of 1,000*l.* hereinbefore bequeathed to the said president, treasurer and governors of Christ's Hospital aforesaid, and the other moiety of such surplus shall be paid to the treasurer for the time being of Hetherington's charity for the blind, under the management of Christ's Hospital aforesaid."

After some other bequests, the testator gave the residue of his estate and effects unto his nephews and nieces living and born at his decease, share and share alike, as tenants in common, for their own absolute use and benefit.

[\*388] The testator, by a codicil, dated in April, 1821, after \*reciting the bequest of 30,000*l.* stock of the London Dock Company, and that doubts might be entertained whether he could, consistently with the provisions of the mortmain laws, legally and effectually bequeath London dock stock upon the trusts in his will expressed concerning such stock, revoked the gift and bequests, in his will made, to the president, treasurer and governors of Christ's Hospital aforesaid, of the said 30,000*l.* London dock stock, and, in lieu thereof, gave to them 40,000*l.* three per cent. consolidated bank annuities, upon the same trusts, and for the same purposes as were in his will expressed concerning the London dock stock.

The bill was filed by some of the residuary legatees, who insisted that, with regard to the 40,000*l.* three per cent. stock bequeathed by the will and codicil to the president, treasurer and governors of Christ's Hospital, such bequest was only good in respect of such charities as were specifically named and

1825.—*Pieschel v. Paris.*

pointed out by the testator as the objects of his bounty; and that, in regard to all such other parts of the 40,000*l.* three per cent. stock, in respect of which blanks were left by the testator in his said will for the names of the other charities which were to be entitled, or the sums to which they were to be entitled, the same were void for uncertainty; and that so much of the said 40,000*l.* three per cent. stock, as was not well bequeathed by the will, fell into and constituted a part of the general residuary personal estate of the testator.

The governors of Christ's Hospital, by their answer, claimed an interest in so much of the 40,000*l.* three per cent. stock, and the interest or dividends thereof, as was not specifically bequeathed by the will, and in respect \*of which blanks were left in the will; and insisted that, as such [\*389] governors, they were alone entitled to apply and distribute such parts of the 40,000*l.* three per cent. stock, or of the interest and dividends thereof, in respect of which such blanks were left, either for the benefit of Christ's Hospital, or to such other charitable purposes as they might think proper, and that the same did not pass to, and form a part of, the general personal estate of the testator.

*Mr. Heuld, and Mr. Phillimore, for the plaintiffs:*—This cannot be held to be a gift for charitable purposes, generally; because not only the mode of application is left uncertain, but the very sum which is to be the substance of the gift is undefined. *Mills v. Farmer.*(a) The court has certainly held that, where a testator gives a legacy to a charity, to be named in a codicil to his will, although no codicil is made, it is a good gift for general charitable purposes, to be effectuated under the direction of the court. But, in all these cases, the precise amount of the gift is specified by the testator. Where the amount is not specified, as in this case, there is so much uncertainty that the court cannot act.

*Mr. Turner, for some of the residuary legatees, who were defendants:*—The cases have certainly gone a great length in effectuating a general intention to give for a charitable purpose. But if the court can collect that it was not the intention to dispose of the legacy at all, unless for some particular charity, there is great difficulty in holding that there is any gift at all for any charitable purpose.

\**Mr. Daniell, for the governors of Christ's Hospital:*—It is plain, [\*390] as the blanks were not filled up, and as there is a general gift to a charity, that the testator meant, if he did not fill up the blanks, that the whole should go to Christ's Hospital. In *Moggridge v. Thackwell.*(b) the Lord Chancellor laid down the principle that, where there is a general indefinite purpose, not fixing itself upon any object, as this in a degree does, the disposition is in the king by sign manual; but where the execution is to be by a trustee, with general or some objects pointed out, there the court will take the administration of the trust. On the authority of that case, the execution

(a) 1 Mer. 55.

(b) 7 Ves. 86.

1825.—Pieschel v. Paris.

of the charitable trust is here, by the will, vested in the governors of Christ's Hospital, who would be entitled to lay before this court a scheme for the administration of the charity. *Baylis v. The Attorney-General*, (c) and *Wheeler v. Sheer*, (d) are to the same effect.

*Mr. Wray*, for the attorney-general:—This is a stronger case than *Mills v. Farmer*; for, in that case, and in a case in 2 Freeman, 262, ca. 330, b. there cited, the court proceeded upon a mere general indication to give to a charity. In that case the disposition of the fund was left to the crown, and the same course should be pursued here.

The VICE-CHANCELLOR:—The testator gives to the president, treasurer and governors of Christ's Hospital, a legacy of 1,000*l.*, upon condition [\*391] that they, and their successors for ever, \*do distribute and pay the various annual sums next in his will directed to be paid, to the various charitable and other establishments thereafter mentioned; and, for that purpose, he gives to the president, treasurer and governors of the hospital, 30,000*l.* stock, bearing an interest of four per cent., in the London Dock Company, commonly called London Dock Shares, upon the trusts after mentioned, that is to say, upon trust that they, the president, treasurer and governors for the time being, should, from time to time for ever thereafter, receive the dividends, interest and annual proceeds of the dock shares, and should apply the same in the manner and for the purposes thereafter mentioned: he then directs that, of such interest and dividends, they shall every year pay the sum of 100*l.* to the treasurer of the London Hospital, for the sole use and benefit of that charity; and, in like manner, he directs that, of such interest and dividends, they shall every year pay certain other sums, amounting together to 650*l.*, to nine other charitable institutions, for the use and benefit of those charities; he then directs that they shall, every year, pay the sum of , other part of the said interest and dividends, to the treasurer of , to be by him applied for the benefit of that charity; and these blank gifts are four times repeated in the same form of expression. He then directs that they do and shall, every year, pay the sum of 200*l.*, being the residue of the said interest and dividends, to the Earl of Chichester for the time being, to be by him applied to certain other charitable purposes there specified. This last disposition makes it evident that the four blank gifts were intended to amount together to the sum of 250*l.*, which, being added to the sum of 750*l.* before given, and the 200*l.* after given to the Earl of Chichester, would complete [\*392] the \*full sum of 1,200*l.*, being the amount of the annual interest or dividends on the 30,000*l.* stock in the London Dock Company.

The effect of this will is, that it manifests a general disposition of the testator to dispose of the sum of 1,200*l.* in charities; but that the testator had not absolutely made up his mind as to the particular charities which should share in the 250*l.*

1825.—*Winter v. Blades.*

I am of opinion, upon the authority of the case of *Mills v. Farmer*, and the cases there referred to, that this court will execute that general intention; and that it must, in that case, be referred to the master to approve of a scheme for the application of this 250*l.* having regard to the nature and character of the other gifts contained in the will.[1]

\*WINTER V. BLADES.

[\*393]

1825, 29th June; 17th August.—*Vendor and purchaser.—Interest.*

Where the purchaser, upon entering into possession, paid the amount of his purchase money to his banker, and gave notice that he was ready to invest it in such manner as he, the vendor, should require; but no answer was returned to that notice, and the purchaser, during the investigation of the title, kept in the hands of his banker a balance equal to the amount of the purchase money, except for four days, when it was a little less; the court held the purchaser not liable for interest on the difference between his average balance during the period in question and during the three preceding years.

THE bill in this cause was filed, by the vendor of an estate, merely for the purpose of claiming interest on the purchase money from the time the defendant, the purchaser, was let into possession. The purchase money was 14,000*l.* and, immediately upon entering into the contract, the purchaser called in a sum of money, secured by a mortgage, amounting to 12,400*l.*; and upon entering into possession of the estate, gave notice to the vendor that he was ready to invest the purchase money as he should direct, pending the investigation of the title. The vendor, hoping for an immediate conclusion of the purchase, did not answer that notice. The investigation of the title, however, occupied nine months.

The banker of the defendant proved that, during the nine months, the balance of the defendant in his hands was never less than 14,000*l.* except during three successive days, when it was 13,876*l.*, and one other day, when it was 13,769*l.*

Mr. *Horne*, and Mr. *Pemberton*, for the plaintiff:—The court has held the purchaser liable to pay interest in cases much stronger than the present. In *Powell v. Martyr*,<sup>(a)</sup> it was decided that there must be absolute notice, not only that the purchase money is appropriated, but also that it is [\*394] unproductive, in order to relieve the purchaser from payment of interest. In that case, there were two circumstances stronger than any which occur in the present; for it was there proved, 1st, that the amount of the purchase money was paid by the purchaser into the hands of his solicitor; and 2d, that it was appropriated for payment to the vendor. Here there was no appropriation. The money was merely paid by the defendant into the hands

(a) 8 Ves. 146.

[1] Vide *Ellis v. Selby*, 7 Sim. 352.



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of his banker, where he must have had a balance, at any rate. *Comer v. Walkley*,<sup>(b)</sup> and *Dickenson v. Heron*,<sup>(c)</sup> are cases in which, notwithstanding long delays in completing the purchase, and delays not imputable to the purchaser, he was yet decreed to pay interest. It must be admitted that the defendant here stated that the money was ready, and might be invested at the desire of the plaintiff. But that is not sufficient; for, if the money was invested in exchequer bills, it would still have been ready, but not unproductive; for it is settled there must be distinct notice that the money is unproductive. There are cases in which the court charges a party with interest on trust money, even when he has made no profit on it, but kept it idle at his banker's; [1] for the court considers that as an employment of the money, because it relieves the party from keeping there a balance of his own money. The defendant cannot avail himself of the fact which he endeavors to establish, as to the delay in the completion of the title being the fault of the plaintiff. The principle on which the court acts as to the payment of interest is, that the [\*395] fund is \*productive, or that the vendor has no notice of its being unproductive.

Mr. *Hart*, and Mr. *Pepys*, for the defendant, insisted on the facts that the money had been unproductive; that the delay had been occasioned entirely by the plaintiff, although the defendant did all in his power to urge him on to a completion of the contract; and that the defendant had called in a mortgage, for the sole purpose of obtaining the money to pay for his purchase; and that, at the very time when the plaintiff sent notice that he expected interest at five per cent., he had not shown a good title to the estate.

The Vice-Chancellor recommended the parties to come to a compromise; but, as they declined doing so, the case stood for judgment.

The VICE-CHANCELLOR:—If, after the notice given by the defendant, he had made no profit of the purchase money, then it would not be reasonable that he should be charged with interest. But that he has made some profit of the money appears upon the defendant's own evidence; first, because his balance at his banker's was, in a small degree, and for a few days, reduced below the amount of the purchase money; but, principally, because the purchase money supplied the place of that balance, which he must otherwise have maintained at his banker's.

Let the master inquire what was the average balance which the defendant maintained at his banker's during the three years preceding the purchase, computing such balances at the end of every month; and let the [\*396] \*master also inquire what was the average balance which, during the time in question, the defendant maintained at his banker's, computing such balance monthly; and let the master deduct what he shall find to

• (b) Cited from Reg. Lib. in Mr. Sugden's *Treatise on Vendors and Purchasers*, 6th edit. 461 and 462.

(c) *Ibid*.

[1] Vide *Gray v. Thompson*, 1 Johns. Ch. Rep. 89; *Jennings v. Davis*, 5 Dana, 132.

1825.—*Kilvington v. Gray.*

have been the defendant's average balance for the three years, from what he shall find to have been the defendant's average balance during the time in question ; and declare that, to the amount of that difference, the defendant is not chargeable with interest on his purchase-money.[1]

KILVINGTON V. GRAY.

1825, 11th July; 17th August.—*Devise.—Residue.*

Testator directed his residuary estate to be laid out in the purchase of land, as soon as a convenient purchase could be found, in the county of York, which, upon a fair letting, would produce a yearly rent equal to three and a half per cent upon the amount of the purchase money and, in the mean time, the interest of his residuary estate to be accumulated. The tenant for life will be entitled to the interest of the residuary estate, from the end of one year after the testator's death, until it is laid out as directed.

THOMAS KILVINGTON, by his will, dated in 1822, after devising his real estates to the plaintiff for life, with divers remainders over, disposed of the residue of his personal estate in the following manner :—" I give and bequeath all the rest and residue of my personal estate and effects, of what nature soever, which shall remain after payment of my debts, legacies, funeral and testamentary expenses, unto William Gray and Francis Barrowby, their executors, administrators, and assigns, upon trust that they do and shall lay out and invest the same in the purchase of messuages, manors, lands, tenements and hereditaments of inheritance, in fee simple, in possession, to be situated in

\*the county of York, when and as soon as a convenient purchase or [\*397] purchases can be found, which, upon a fair letting, will produce a yearly rent equal to three and a half per cent. upon the amount of the purchase moneys to be paid for the same: and do and shall convey, settle and assure such manors, lands, tenements and hereditaments to such and the same uses, upon and for the same trusts, intents and purposes, and with and under and subject to such and the same powers, provisoes and declarations as are hereinbefore limited, expressed and contained of or concerning my freehold lands, messuages, tenements, tithes and hereditaments first hereinbefore devised, or such, or so many of them as shall be then subsisting or capable of taking effect. Provided always, and I do declare my will to be, that, in the mean time, and until such purchase or purchases as aforesaid can be found, the said

[1] Vide *Esdaile v. Stephenson*, 1 Sim. & Stu. 122. A vendee who enjoys the estate and withholds the purchase money, until a dispute in the title is adjusted, ought to pay interest. *Breckenridge v. Hoke*, 4 Bibb. (Kent,) 273. A vendee of land let into possession, and the purchase money remaining unpaid, shall pay interest thereon though the vendor be in default, unless he has not only kept the purchase money idle, but given the vendor notice that he has so kept it. *Brockenbrough v. Blythe*, 3 Leigh. (Virg.) 619. A greater degree of vigilance is required on the part of the vendor in perfecting the title to the purchaser, where the latter is not in possession of the property purchased, than is required from him where the vendee is in possession under the contract. *Moore and others v. Smedburgh and others*, 8 Paige, 601.

1825.—*Kilvinton v. Gray.*

W. Gray and F. Barrowby, their executors, administrators and assigns, shall lay out and invest, in the public stocks or funds, such part of my residuary personal estate as shall not, at the time of my decease, consist of stock in the public funds, and shall permit and suffer such part thereof as shall consist of stock in the public funds to remain in the same funds: and I direct that the said W. Gray and F. Barrowby, their executors, administrators and assigns shall, from time to time, receive the interest, dividends and annual produce of all the said stocks and funds, and lay out and invest the same in or upon stocks or funds of the same nature, so that the same stocks or funds, interest, dividends and annual produce may, until such purchase of lands or hereditaments as aforesaid can be found, accumulate: and I do hereby declare and [\*398] direct that the said W. Gray and F. Barrowby, their executors, administrators and assigns, shall stand and be possessed of all the interest, dividends and annual produce, stocks and funds, and, the accumulation thereof respectively, upon the same trusts as are hereinbefore declared of and concerning my residuary personal estate, from which such accumulation shall have proceeded."

The will also gave the usual power of sale and exchange to the trustees.

The testator died in September 1823.

The bill prayed that the trusts of the will might be carried into execution; that the residue of the personal estate might be ascertained and invested under the direction of the court: and, until a purchase could be found, that the clear income of the residue might be paid to the plaintiff.

Mr. Hart, and Mr. Pemberton, for the tenant for life:—At the present price of land, it is in vain to expect that it can be bought so as to yield the percentage fixed by the testator. This case must be decided on the authority of *Angerstein v. Martin*,<sup>(a)</sup> and *Hewell v. Morris*; <sup>(b)</sup> and the tenant for life must be held entitled to interest upon the residue from the time of the testator's death. It is important to observe that the will gives to the trustees a power of sale and exchange.

[\*399] \*Mr. Wray, for an infant defendant entitled in remainder:—*Sitwell v. Barnard*<sup>(c)</sup> is exactly similar to this case, except that there the direction was to invest the residue, with all convenient speed, in the purchase of lands; whereas here, lands in a particular situation are mentioned.

Mr. Barber, and Mr. Turner, for other defendants.

The VICE-CHANCELLOR:—The question in this cause is, whether from any and what period the tenant for life of the devised freehold estates, is entitled to the interest of the residuary personal estate, which had not been laid out in land.

This case differs from *Sitwell v. Barnard* only in this circumstance: that the testator directs his residuary personal estate to be laid out in the purchase of land, not with all convenient speed, as in the case of *Sitwell v. Barnard*, but when and as soon as a convenient purchase can be found in the county of York.

(a) 1 Turn. 232. .

(b) Ibid. 241.

(c) 6 Ves. 520.

1825.—Bird v. Wood.

which, upon a fair letting, will produce a yearly rent equal to three and a half per cent. upon the amount of the purchase money. I cannot intend that the testator meant to use the latter words as strict words of condition, and that no person should ever beneficially enjoy this part of his property until such condition was absolutely complied with, which, by possibility, might never happen. But I must consider the expression used as merely directory, and meant to enforce a diligent and cautious attention on the part of the trustees in the discharge of their duty. Adopting this construction, the case becomes the same as *Sitwell v. \*Barnard*; and I shall follow that case in de- [\*400] clarating that the tenant for life is entitled to all interest of the testator's residuary personal estate, accruing from the end of one year after the testator's death. (d)

## BIRD v. WOOD.

1825, 12th July, 17th August.—Will.—Construction.

Bequest to the testatrix's daughter for life, and after her death as she should appoint, and, in default of appointment, to the testatrix's next of kin, to be considered as a vested interest from the testatrix's death, except as to any child afterwards born of her daughter. The daughter having died without having had any child, and without executing any appointment: held that the persons who would be next of kin at the testatrix's death, if her daughter had been then dead without children, were entitled.

ELIZABETH LOSE bequeathed to trustees all her interest and shares in the funds and capital stock transferable at the bank of England, or which might be standing in her name at her death, or she might be entitled unto as the widow and one of the next of kin of her late husband, upon trust to pay the interest and dividends thereof into the proper hands of her daughter Mary, the wife of the defendant Thompson, during her natural life; and, after the death of her daughter, to transfer the stock, and pay the interest and dividends thereof unto such persons or person, and in such shares and proportions, as her daughter, whether sole or covert, should, by deed or will executed as therein mentioned, give or devise the same; and, for want of such gift or devise, then upon trust to assign and transfer the stock, and pay the unpaid dividends thereof, unto her own next of kin, according to the statute of distributions, to be considered as a vested interest from the time of the testatrix's death, except only as to any child that might be afterwards born of her daughter.

The testatrix's daughter died intestate, without ever having had a child, and without having executed the power of appointment. Her [\*401] husband survived her, took out letters of administration of her estate and effects, and now claimed to be entitled to the fund bequeathed.

The bill was filed against him by certain persons who would have been the

(d) See the various cases commented upon in *Angerstein v. Martin*, 1 Turn. 232, and *Hewett v. Morris*, *ibid.* 241. [Vide *Clifton v. Cockburn*, 3 Mylne & Keene, 76.]

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 1825.—Gell v. Watson.
 

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next of kin of the testatrix at the time of her death, if her daughter had then been dead without issue; and the question was, whether they or the husband were entitled to the fund.

Mr. *Horne*, and Mr. *Matthews*, for the plaintiffs:—It is clear that the testatrix did not mean to die intestate as to any thing. The will authorizes the exclusion of the daughter, because, without excluding her, it is impossible to make sense of it.

Mr. *Boteler*, for defendants in the same interest with the plaintiff, cited *Jones v. Colbeck*,<sup>(a)</sup> where the court, on a direction that, upon the decease of the testator's daughter without issue, the estate should go in a due course of administration, held that those who were next of kin at the death of the daughter were entitled.

Mr. *Phillimore*, for the daughter's husband, cited *Holloway v. Holloway*,<sup>(b)</sup> and *Doe v. Lawson*.<sup>(c)</sup>

Mr. *Abercrombie*, for other defendants, said that the clear meaning of the words was, that the persons who were next of kin at her death should take; and that their interest should become vested upon her death.

[\*402] \*Mr. *Wray*, for other defendants.

The VICE-CHANCELLOR:—The persons who, at the testatrix's death would have been her next of kin if her daughter had been then dead without children, are plainly intended here. The daughter could not be such next of kin; for the persons intended were to take at her death: and the persons intended must have been living at the death of the testatrix; for their interests were then to be vested.[1]

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#### GELL v. WATSON.

1825, 17th August.—*Vendor and purchaser.*

Purchase money paid into court is the property of the vendor.

THE Vice-Chancellor ruled that, where a purchaser pays into court a sum of money on account and in part of the purchase-money, it is the money of the vendor, who is to take the chance of the rise or fall of the stock.

(a) 8 Ves. 38.

(b) 5 Ves. 399.

(c) 3 East, 378.

[1] The words "next of kin" used *simpliciter*, and without any explanatory context, must be taken to mean "nearest of kin." *Elmsley v. Young*, 2 Mylne & Keene, 780; overruling, S. C. Id. 82. *Hinckley v. McLaren*, 1 Mylne & Keene, 27.

1825.—Reeve v. Hicks.

## \*REEVE v. HICKS.

[\*403]

1825, 4th July ; 17th August.—*Baron and fems.—Mortgage.*

Husband and wife mortgaged the wife's freeholds for 1,000 years, reserving the power to redeem to them, or either of them, and covenanted to levy a fine to the mortgagee for the term, and subject thereto, to the husband in fee : they also surrendered the wife's copyholds to the mortgagee in fee, reserving the power to redeem to the husband and his heirs ; the husband afterwards released his equity of redemption, as to both estates, to the mortgagee in fee : the mortgagee entered into possession, and the husband afterwards died : Held that the wife is entitled to redeem the copyholds, but not the freeholds.

This was a bill for the redemption of a mortgage of freehold and copyhold estates.

In March 1760, Anne Reeve, being seised in fee of certain copyhold estates, joined with Bendall Reeve, her husband, in making a voluntary surrender of them to the use of herself for life, remainder to Bendall Reeve for life, remainder to the children or grandchildren of Anne Reeve, living at her death, in such shares as she should appoint ; and, in default of appointment, to her children, as tenants in common in fee : but, if she should die in the lifetime of Bendall Reeve, and leave no child or grandchild living at her decease, or they should all die in the lifetime of Bendall Reeve, under the age of twenty-one, and without issue, then to the use of Bendall Reeve in fee.

Bendall Reeve, being seised in fee, in right of his wife, of certain freehold estates, by indenture, dated the 10th of February 1770, joined with his wife, in demising them for a term of 1,000 years, by way of mortgage, to John Burrell, to secure the repayment of a sum of money lent to him by Burrell. This deed contained a reservation of a pepper-corn rent, during the term, to Bendall Reeve and Anne his wife, and to the heirs and assigns of Anne ; and also a covenant, on the part of Reeve, for himself and his \*wife, that [\*404] they would, as of the next term, at his costs and charges, levy a fine *sur conuzance de droit come ceo*, &c. with proclamations, of the estates thereby demised, to the use of Burrell for the term thereby demised, for better securing the mortgage money, and, subject thereto, to the only use and behoof of Reeve, his heirs and assigns, for ever, and for no other use, intent or purpose whatsoever. The clause for redemption provided that, upon repayment of the mortgage money and interest, by Bendall Reeve and Anne his wife, or either of them, their or either of their heirs, executors, administrators or assigns, upon the 10th of February 1771, the term of 1,000 years should cease.

A fine was duly levied by Reeve and his wife, pursuant to the covenant.

By an indenture, dated the 27th of December 1775, after reciting that one Hicks had paid off the mortgage money due to Burrell, Reeve and Burrell assigned the remainder of the 1,000 years term to Hicks, with a proviso that, upon repayment of the mortgage money by Reeve, his heirs, executors or administrators, on the 27th of June 1775, the term should cease ; and Reeve covenanted that, for better securing the mortgage money, he and his wife

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would surrender the copyhold estates to Hicks in fee, subject to the same proviso for redemption as was reserved as to the freeholds.

On the 3d of January 1776, Reeve and his wife surrendered the copyhold estates to Hicks in fee, pursuant to the last-mentioned covenant.

By indentures of lease and release, dated the 20th and 21st of August [\*405] 1779, made between Reeve of the \*one part, and Hicks of the other part, after reciting that no part of the principal money or interest secured by the mortgage to Hicks had been paid, but that a larger sum was due in respect of it than the mortgaged estates were really worth, Reeve released to Hicks, his executors, administrators and assigns, all his equity of redemption in the freehold and copyhold estates.

After this release, Hicks entered into possession both of the freehold and copyhold estates, and was admitted to the copyholds, which he surrendered to the use of his will; and died in 1801, having devised his freehold and copyhold estates to the defendant.

Reeve died intestate, in 1809, leaving his wife surviving him.

The original bill was filed in 1820, by her and her two children, for a redemption of the freehold and copyhold estates.

Mr. *Treslove*, for the plaintiffs:—If there be nothing more than a mere mortgage of the wife's estate, it is settled that a husband cannot deprive her of the equity of redemption by reserving it to himself and his heirs alone. *Corbett v. Barker*,<sup>(a)</sup> applies to this case, and is of higher authority, because the court did not adhere to the opinion which it first pronounced. In the report of that case, however, there is a mistake in saying that the equity of redemption was reserved by fine. This error in the report was noticed by Mr. Richards, in his argument in *Innes v. Jackson*.

[\*406] \*Mr. *Sugden*, and Mr. *Kindersley*, for the defendant:—

1st. As to the freehold estates. The court is here asked, at the distance of fifty years, to strike out the limitation of the uses of the fine to the husband. It is a strong circumstance towards inducing the court to give effect to the limitation in favor of the husband, that a term only is limited to the mortgagee, and not the whole fee-simple. There is no case in the books in which, there being a distinct limitation to the husband, and nothing indicating a different intention on the face of the deed, that limitation has been held to be nugatory. Supposing the wife had intended to limit the estate to her husband, as appears on the face of this deed, it would make no difference who was to pay the mortgage money. *Innes v. Jackson*,<sup>(b)</sup> as decided in the house of lords, went to this extent, that, although there be no declaration on the face of the mortgage deed of an intention to limit the equity of redemption to the husband alone, yet, if there be, in the deed, express words which so limit it, effect must be given to those words.[1] *Corbett v. Barker*,<sup>(c)</sup> was a case quite dif-

(a) 1 Ana. 138, and 3 Ana. 755.

(b) 1 Bligh, 104.

(c) 1 Ana. 138. 3 Ana. 755.

[1] It seems that in a mortgage of the wife's property the equity of redemption may be reserved to the husband alone; *Demarest v. Wynkoop*, 3 Johns. Ch. Rep. 147.

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ferent from the present, because there was in it a gross and manifest inconsistency on the face of the deed, which contained no limitation at all to the husband, but only a reservation to him of the equity of redemption. The whole amount of that decision was, that an inaccurate expression should not be so construed as to pervert the whole deed. But, even there, the first decision of the court, when Chief Baron Eyre presided, was, that the husband was entitled; and, although afterwards the court altered its opinion, when Chief Baron \*Macdonald presided, it must be admitted that the latter deci- [\*407] sion was not likely to carry greater weight with it than that of the former chief baron. And, when the last decision on that case is carefully examined, it will be found that it cannot stand. Where a party is held to be bound by a deed, he must also be held entitled to all the benefits which the deed confers on him. What the plaintiff asks in this case is, to cut down the deed so as to give her all the benefits which can be had under it, and to throw the whole burden on her husband.

2d. As to the length of time. The wife was here under the same disability at the time when the mortgage was made, as that which can alone be relied on as excusing the length of time which has elapsed before she claimed this equity of redemption. She cannot be heard to say that she stands in a new situation, which gives her new rights; as the very right which she claims arises from her own acts during the disability of her coverture. *Cholmondeley v. Clinton.*(d)

3d. As to the copyholds. The defendant is clearly entitled to them, the surrender in 1760 being merely voluntary, and the stat. 27 Eliz. c. 4. including copyholds. *Doe v. Routledge.*(e)

Mr. Tveslove, in reply :—The deed of 1770 contains a *reddendum* to Bendall Reeve and Anne his wife, and to the heirs of Anne. That is clear evidence of an intention to reserve the equity of redemption to her, as the rent is incident to the reversion.

\*2d. As to the length of time with reference to the disability of [\*408] coverture. *Corbett v. Barker*, and *Cornel v. Sykes*,(f) are express authorities that length of time is no bar to such a claim, where there has been the disability of coverture. In the former of those cases there had been a lapse of forty years before the institution of the suit.

The VICE-CHANCELLOR :—This case is not distinguishable in principle from *Innes v. Jackson*. The limitation of the uses of the fine to the husband and his heirs, has no connection with the purpose of mortgage, or the proviso of redemption, but is altogether a new settlement which defeats the heir of the wife.

Declare the freeholds to be irredeemable, and the copyholds to be redeemable by the plaintiff; and refer it to the master to apportion the mortgage

(d) 2 Jac. and Walk. 1.

(e) Cowp. 705.

(f) 1 Cha. Rep. 193. See also *Jenner v. Tracey*, and *Belch v. Harvey*, 3 P. W. 287, note, B.



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money between the freeholds and copyholds; the plaintiff to be at liberty to redeem the copyholds, on payment of what the master shall apportion as to the copyholds, with interest, with an account of the rents and profits from the death of B. Reeve.[1]

[\*409]

\*KINCH v. WARD.

1825, 3d November.—*Devise.—Construction.*

Devise of freeholds and leaseholds to A. for life, and after his decease to the heirs of his body, their heirs, executors, &c. gives A. an estate tail in the former, and the absolute interest in the latter.

THIS suit was instituted to enforce the performance of an agreement entered into by the plaintiffs, who were the executors of one Thomas Edoe, for the sale of some leasehold property which Thomas Edoe became entitled to under his father's will. The defendant, the purchaser, demurred to the bill, generally. On the argument of the demurrer, the question was, whether Thomas Edoe took the absolute, or a life interest only in the property, under his father's will.

The will was as follows:—"I give and devise unto Thomas Kinch and Thomas Ebsworth, all and singular my freehold and copyhold estates, situate, lying and being in the parish of Great Farringdon, in the county of Berks, or elsewhere in Great Britain, all which copyhold estates I have already, or do intend to surrender to the use of this my last will and testament. Item, I give and devise unto the said Thomas Kinch and Thomas Ebsworth, all and singular my leasehold estates, situate, lying and being in the parish of Great Farringdon aforesaid, and in Radcott in the county of Oxford, and elsewhere in Great Britain, to have and to hold all and singular my said freehold and copyhold estates unto the said Thomas Kinch and Thomas Ebsworth, and the survivor of them, his heirs and assigns, and to have and to hold all and singular my said leasehold estates and premises unto the said T. Kinch and

T. Ebsworth, and the survivor of them, his executors, administrators  
[\*410] and assigns, for all such term and terms of \*years, estate and interest, as I shall have therein to come and unexpired at my decease, upon the several trusts, and to and for the several uses, intents and purposes, and subject to the several provisoes and conditions hereinafter mentioned and declared of and concerning the same respectively, (that is to say,) as to, for and concerning all and singular my said freehold, copyhold and leasehold estates and premises, upon trust to permit and suffer my wife, Mary, to have, receive

[1] As to the analogy between the limitation of a right of redemption, and of a right of entry, see *Demarest v. Wynkoop*, 3 Johns. Ch. Rep. 129; *Larmer v. Jones*, 3 Har. & M'Hen. 328; *Fenwick v. Macy*, 1 Dana. 279.

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and take the rents, issues and profits thereof for and during the term of her natural life, or for so long time as she shall continue my widow, and unmarried, for and towards her support and maintenance, and the maintenance, education and bringing up of my children, Thomas, William, Margaret and Mary Edoe; and, from and immediately after the decease of my said wife, or intermarriage with any other husband, then upon trust to permit and suffer my son, Thomas Edoe, to receive and take the rents, issues and profits of all that messuage or tenement called the Bear Inn, with the garden, stables, out-houses, buildings and appurtenances thereunto belonging, situate, lying and being in Great Farringdon aforesaid, and of all that messuage or tenement, with the appurtenances, now in my own possession, situate in Great Farringdon aforesaid, and also of all that meadow or pasture ground, situate, lying and being in Radcott, in the county of Oxford, called or known by the name of Rye Meadow, Honeyham, and the Staff, containing by estimation forty-five acres, be the same more or less, for and during the term of his natural life; and, from and immediately after the decease of my said son Thomas Edoe, then I give and devise the said two messuages or tenements, and close of meadow or pasture ground, with the appurtenances, unto the heirs of \*the body of my said son Thomas Edoe, lawfully begotten, their heirs, [\*411] executors, administrators and assigns, for ever; but in case my said son Thomas Edoe shall die without issue, then I give and devise the said two messuages or tenements, and close of meadow or pasture ground, with the appurtenances, unto my said trustees, upon trust for the benefit of my said son William Edoe, and the heirs of his body lawfully begotten, in like manner as I have hereinbefore given and devised the same for the benefit of my said son Thomas Edoe, and the heirs of his body lawfully begotten; and, for default of issue of the body of both my said sons Thomas and William Edoe, then I give and devise the said two messuages or tenements, and close of meadow and pasture ground, with the appurtenances, unto my two daughters Margaret and Mary, and to their respective heirs, executors, administrators and assigns, for ever, to take as tenants in common and not as joint tenants."

The testator left his widow, and the four children named in his will, surviving him. Thomas Edoe, on his mother's death, entered into possession of all the estates. William Edoe died in the lifetime of Thomas, leaving issue a daughter. Thomas Edoe died in February 1823, without issue. One of the testator's daughters also was dead when the bill was filed; the other was still living.

Mr. *Sugden*, and Mr. *Temple*, in support of the demurrer:—The question is, whether the trustees can make a good title to the leaseholds; or, in other words, whether Thomas Edoe, the son, took a *quasi* estate tail in \*them, or a life estate only. We contend that he took a life estate only, [\*412] and that, upon his decease, his children took the property as purchasers. In the first place, the bequest to the heirs of the body is distinct from that to the ancestor; for the testator gives the estate to trustees, in trust to permit his son

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to receive the rents thereof, which creates a trust that expires at the death of the son. But he devises the messuages themselves to the heirs. This distinction was taken in *Shapland v. Smith*,<sup>(a)</sup> and there are other cases to the same effect cited in *Fearne Cont. Rem.* 158, 6th edition. In the next place, words of limitation are superadded to the devise to the heirs. In all cases where the first taker is held to have an estate tail, the devise to the heir would give him an estate tail also. Here the devise to the heir of Thomas Edoe, the son, gives him an estate in fee as to the freeholds, and the absolute interest as to the leaseholds. *Loddingon v. Kime*.<sup>(b)</sup> There is no inconsistency in admitting that the son takes an estate tail in the freeholds, and that he takes a life interest only in the leaseholds; for the same words may have a different effect, as applied to one species of property, from what they have when applied to another. *Forth v. Chapman*.<sup>(c)</sup> The case of *Hodgeson v. Bussey*<sup>(d)</sup> closely applies to the present one; indeed, it is impossible for two cases to be more like each other. The case of *Wilkinson v. South*<sup>(e)</sup> also supports the construction which we are contending for. The court was not, in that case, called upon to give an opinion whether the first taker took a life estate, or a quasi estate tail, for the property would have gone over in either case, [\*413] yet Lord Kenyon, C. J. expressed an *obiter* opinion that the first taker took a life estate only.

Mr. *Pemberton*, in support of the bill :—It is clear that the testator intended to make a general disposition of his freeholds, copyholds and leaseholds. He gives them all in one mass. The term in the leaseholds was 500 years, which is equivalent to a freehold interest. It is quite settled that a devise to A., to permit and suffer B. to take the rents, gives the legal estate to B. In *Shapland v. Smith* the trustees were directed to pay rates, taxes and repairs out of the rents, and to pay the residue to the testator's brother; and, therefore, it was necessary that they should take the legal estate. If the will had concluded with the devise to the heirs of the body of Thomas Edoe, their heirs, executors, administrators and assigns, it would have admitted of considerable doubt, whether the heir would not have taken absolutely, and the father, for life only. But, even in that case, the observations of Lord Kenyon, C. J. in *Wilkinson v. South*, are sufficient to make the court pause before it come to that decision. In *Hodgeson v. Bussey*, Lord Hardwicke, C. relied on the words: "such issue;" and, if the words had been: "for want of issue," he would have decided otherwise. In *Wilkinson v. South* the words were, "in default of such issue;" yet Lord Kenyon seems to think that, unless other words had been introduced, the first taker would have had an absolute interest. In the report of that case it is not mentioned that *Hodgeson v. Bussey* was cited; but it is scarcely possible that it should not have been, for *Read v. Snell* is referred to, and that is reported in the same book. The effect of the subsequent clause in

(a) 1 Bro. C. C. 75.

(d) 2 Atk. 89.

(b) 1 Salk. 224. S. C. 1 Lord Raym. 203.

(e) 7 T. R. 555.

(c) 1 P. W. 663.

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\*this will, is to give the estate over in default of issue, generally, and not [\*414] at a particular period. The words, "but in case my said son, Thomas Edoe, shall die without issue," mean a general failure of issue, and give to the former words their technical effect. The consequence is, that the heir of the body would take an estate in tail; and, wherever the subsequent words show that the heir of the body would take an estate tail, and not a fee, the ancestor takes an estate tail. It cannot be disputed that, if the question had been what estate William Edoe took, it would have been held that he took an estate tail. The clear words in the latter devise must control, not be controlled by the ambiguous ones in the former. The words, "in default of issue of the body of both my said sons," which precede the devise to the daughters, show that he meant that bequest to take effect on a general failure of issue only, and that the former words should have their legal effect. *Murthwaits v. Jenkinson*, (f) *Crooke v. De Vandes*, (g) and *Elton v. Eason*, (h) are all authorities in support of the plaintiff's case.

Mr. Sugden, in reply:—The bequest over has nothing at all to do with the prior devise. It cannot be brought in aid of the previous limitation, and can be looked at only when it is disputed whether the limitation over is, or is not, too remote. \*In *Hodgeson v. Bussey*, the construction put [\*415] upon the words was with a view to give effect to the limitation over: and, in *Wilkinson v. South*, the question related solely to the gift over, and not to the gift to the heirs of the body. In that case there was no gift, as here, to the first taker, for life; and therefore this is a stronger case than that. But Lord Kenyon was not required to decide upon the first gift; and therefore it is unimportant what quantity of interest was given to the first taker. As to *Crooke v. De Vandes*, and *Elton v. Eason*, they both turned on the validity of the gift over. In the former of those cases, no one could pretend to argue that an estate tail was not created. But in the present there is a gift to Thomas Edoe for life, and then a gift over to his children. These must be read as two separate and distinct gifts. The court does look at the gift over as to freeholds, but not as to leaseholds; because no intention as to the latter could give them to the issue.

The VICE-CHANCELLOR:—This will gives freehold, copyhold and leasehold estates to trustees and their heirs, upon trust to permit the wife of the testator to take the rents and profits for her life, and for so long as she should continue his widow, and, from and after her death, to permit the testator's son, Thomas, to take such rents and profits, for and during the term of his life; and, from and after the decease of his son, Thomas, the testator gave such freehold and copyhold and leasehold estates unto the heirs of the body of his son

(f) 2 Brod. & Bin. 623, and 2 Barn. & Cres. 357. The Lord Chancellor, when the case again came before him, agreed with the court of K. B. as to the freehold property, but held that the limitation over was good, as to the personality; see 3 Barn. & Cres. 191; and this decision has been affirmed by the house of lords.

(g) 9 Vcs. 197.

(h) 19 Ves. 73.

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Thomas lawfully begotten, their heirs, executors, administrators and assigns, for ever ; but in case his son Thomas should die without issue, then [\*416] he gave the said leasehold, copyhold and freehold estates upon trust for the benefit of his son William and the heirs of his body lawfully begotten, in like manner as he had thereinbefore given and devised the same for the benefit of his son Thomas and the heirs of his body ; and, for default of issue of both his said sons, then he gave and devised the said estates to his two daughters, their heirs, executors, administrators and assigns, as tenants in common. The testator's son Thomas entered upon these several estates after the death of the widow, and, the copyhold part of the property having been enfranchised, he suffered a recovery of the freehold and enfranchised copyholds, and died without issue, having, by his will, devised the leasehold part of the property to the plaintiffs, who have entered into a contract for sale of the same to the defendants. This is a bill for the specific performance of that contract ; and the defendant has demurred to it, upon the ground that the will of the original testator did not give the absolute property of the leasehold to his son Thomas. It has not been argued that Thomas, the son, did not take an estate tail in the freehold and copyhold : but it is said that his devise of the freehold, copyhold and leasehold estate to Thomas and the heirs of his body, their heirs, executors, administrators and assigns, is to be thus rendered, as a devise of the freehold and copyhold to Thomas and the heirs of his body and their heirs, and as a devise of the leasehold to Thomas and the heirs of his body, their executors, administrators and assigns ; and that, notwithstanding there are subsequent expressions in the will which would control the words of limitation annexed to the heirs of the body, and give an estate tail to Thomas in the freehold and copyhold, yet that the words ex- [\*417] cutors, administrators and assigns, being to be considered as annexed to the gift of the leasehold, are not controlled by the subsequent expressions in the will, and would, as to that property, make Thomas' children purchasers, and cut down Thomas' estate to a tenancy for life. The defendant's counsel, in support of this proposition, have relied upon the case of *Hodgeson v. Bussey*. But that case differs materially from the present. The gift over here, after the limitation to the heirs of the body, their heirs, executors, administrators and assigns, is not, as in the case of *Hodgeson v. Bussey*, in default of such issue, but in default of issue generally. In default of such issue there, was considered, in default of children to take as purchasers ; and the limitation over was, therefore, good. But here the limitation over, being after a general failure of issue, would be void as too remote.

The case of *Wilkinson v. South* has also been relied upon for the defendant : but there it was considered, from the words, "then after the decease of the first taker," that the limitation over was to take effect if no issue were living at his death. There are no words here that import such an intention.

It was further argued, by one of the counsel, that, as the devise was to trustees to permit Thomas to take the profits of the leasehold, Thomas took only an equitable interest, and that the limitation to the heirs of his body, being

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plainly legal. his estate was necessarily confined to an estate for life. But it has long been settled, beyond all question, that a devise to trustees to permit one to receive the profits of land, is a legal, and not an equitable estate. I am of opinion, \*therefore, that the words of limitation annex- [\*418] ed to the gift to the heirs of the body, must be rejected, as well with respect to the freehold, as the leasehold estate, and that Thomas took an absolute interest in the leasehold property, and, consequently, the plaintiffs can make a good title to the defendant.

Demurrer overruled.[1]

AGAR v. MACKLEW.

1825, 9th November.—*Specific performance.—Arbitration.*

The court will not entertain a bill for the specific performance of an agreement to refer to arbitration, nor substitute the master for the arbitrators.

THE bill was filed by Sir E. F. Agar, Henry Trail, Daniel Raymond Barker and Andrew Macklew, who, together with Digby Hamilton, deceased, were under-lessees of Parsloe's Club in St. James' street. The defendant was the assignee of their lessors, John Fallowfield Scott, Richard Carpenter, William Noble, William Bulmer and William Hervey. The lease to the plaintiffs contained a provision in the following words:—"If the said E. F. Agar, Digby Hamilton, Henry Trail, Daniel Raymond Barker and Andrew Macklew, their executors, administrators or assigns, shall, at any time during the said term hereby granted, be desirous of purchasing all the estate and interest then to come and unexpired of the said J. F. Scott, Richard Carpenter, William Noble, William Bulmer and William Hervey, their executors, administrators and assigns, of and in the said hereby demised messuage or tenement, and shall give notice of such their desire to the said J. F. Scott, R. Carpenter, Wm. Noble, Wm. Bulmer, \*and Wm. Hervey their executors, ad- [\*419] ministrators and assigns, they shall be at liberty to purchase the same, for such price or sum of money as shall be fixed upon by two persons, indifferently to be chosen, as surveyors or appraisers, the one of such surveyors or appraisers to be chosen by the said J. F. Scott, R. Carpenter, W. Noble, Wm. Bulmer and Wm. Hervey, their executors, administrators and assigns, and the other of such surveyors or appraisers to be chosen by the said E. F. Agar, D. Hamilton, H. Trail, D. R. Barker and A. Macklew, such price being calculated on the present value of the lease of the said premises, which it has been agreed by and between the said parties hereto amounts to the sum of 5,000*l.*: and it is further agreed, by and between the said parties hereto, that, in case the said surveyors so to be chosen as aforesaid shall differ about the

[1] Vide *North v. Martin*, 6 Sim. 266.

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value of the said premises, the same shall be referred to a third person, as an umpire, such umpire to be chosen and appointed by the other two surveyors so to be appointed as aforesaid : and it is agreed that the umpirage or determination of such third person shall be binding and conclusive upon the said parties hereto, their executors, administrators and assigns. And the said E. F. Agar, D. Hamilton, H. Trail, D. R. Barker and A. Macklew, their executors, administrators and assigns, shall, upon payment of such valuation, be entitled to an assignment of all the right and interest of the said J. F. Scott, R. Carpenter, W. Noble, W. Bulmer and W. Hervey, their executors, administrators and assigns, of and in the said demised premises."

The bill stated the death of D. Hamilton ; and that the plaintiffs, [\*420] being desirous to avail themselves of the \*power of purchasing the premises, which was so reserved to them in the lease, had appointed Mr. Cockerell, of Burlington street, surveyor, to value the same on their part, and had required the defendant to appoint some other surveyor on his part, to meet Mr. Cockerell ; which the defendant had refused to do. The bill prayed that the defendant might be directed, by the decree of the court, to appoint some fit and proper person to meet Mr. Cockerell, the plaintiffs offering to pay such price for the premises as should be settled by the two arbitrators or umpire ; or, if the defendant should refuse to join in naming a proper person, that it might be referred to the master to ascertain the value, the plaintiffs offering to pay such price as the master should fix.

To this bill the defendant put in a general demurrer for want of equity.

Mr. Sugden, and Mr. Bickersteth, for the defendant :

1st. The court will not decree the specific performance of an agreement to name arbitrators to fix the amount of purchase money. In *Cooth v. Jackson*(a) the question was discussed ; and Lord Eldon, following Lord Rosslyn, laid it down that the court would not interfere, even where the substantial thing to be done, was agreed between the parties, but the time and manner in which it was to be done, was that which they put upon others to prescribe. That rule has ever since been uniformly adhered to. In *Milnes v.*

*Gery*,(b) there was a contract for sale, at a valuation to be made by arbitrators ; but, as the arbitrators could not agree \*upon a price, or upon an umpire, Sir William Grant, held that there could be no specific performance of the agreement for sale. *Blundell v. Brettargh*(c) was a much stronger case ; because the arbitrators were named on the face of the instrument, and it was provided that the award should be made within a certain time. In *Gourlay v. Duke of Somerset*,(d) Sir William Grant, said that there was no instance of a party seeking the interposition of the court and obtaining it, where any part of the relief was to be obtained through the interposition of a third party. *Wilkes v. Davis*(e) is very similar to the present case ; and the Lord Chancellor there certainly said that the court would

(a) 6 Ves. 34. (b) 14 Ves. 400. (c) 17 Ves. 232. (d) 19 Ves. 429. (e) 3 Mer. 507.

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interfere to ascertain the value, in order to direct the specific performance, if the parties have agreed as to a valuation, but have not named parties to make the valuation ; but the plaintiff's counsel here may fairly be challenged to produce a single case where the court has so interfered. *Morse v. Merest*(f) was a different case, and did not involve the question which must here be decided. The court has no jurisdiction to compel that first step, without which there can be no sale ; and it will never direct, by its decree, an act over the execution of which it has no control. Suppose the court were to decree that the defendant should name an arbitrator, how could it compel the execution of that decree ? Or, even if an arbitrator was named, how could it compel that arbitrator to act ? Could it compel the arbitrators to agree upon a price ? It is the constant doctrine of the court never to interfere in cases where it cannot enforce the acts which it is \*called upon to [\*422] direct ; and, upon the same principle, it will not decree specific performance of an agreement for a partnership ; because, as soon as the partnership was formed, the party might dissolve it, and render the decree nugatory. On the principle that, in order to be entitled to a decree at all, a perfect decree must be sought, the court will not decree the partial redemption of a mortgage. As to the case of naming arbitrators to fix a price, the court has followed the civil law, which provides that, in such cases, it is a mere question of arbitration, and not within the cognizance of a court of judicature.

2d. In the present case, the proviso is entirely personal, and is confined to the five persons named in it. It does not apply to the survivors of them, or their representatives, and, therefore, there can be no relief in the present case, even if the principles of the court did not forbid its interference.

Mr. Hart, and Mr. Hayter, for the plaintiffs :—The cases referred to have no application to the present. What is sought here, is not to appoint an arbitrator, but a surveyor, on the part of the defendant, to value the materials ; and, if the surveyors do not agree, the court will ascertain the value through the master. A party who comes for specific performance must have a certain contract, clear in its terms ; and the price is of the essence of the contract. The question here is, whether, where the contract is complete at its inception, and there is a perfect contract to sell at a fair value, if the parties differ as to their own judgment of the value, or refuse to name arbitrators to fix the value, the court can refuse to allow the master to \*fix the value. [\*423] The mode of ascertaining the price mentioned in this proviso, is only stated for the purpose of ascertaining it fairly. This case differs from the cases which have been cited in this, that the mode of ascertaining the value is not here of the essence of the contract. In *Gaskarth v. Lord Lowther*,(g) the court decreed specific performance of an agreement to sell at a fair valuation. *Wilks v. Davis*, and *Milnes v. Gery*, are quite consistent with that, and with every case like the present, where fair value is the substance of the con-

(f) 6 Madd. 26.

(g) 12 Ves. 107.



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 1825.—Anonymous.
 

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tract, and the covenant to appoint arbitrators is only one mode of ascertaining that value. *Hall v. Warren(h)* is quite in point.

The VICE-CHANCELLOR :—There is no weight in the second objection. The first expression in the proviso is: "If the five lessees, their executors, administrators or assigns, shall be desirous of purchasing." It is plain, therefore, that it was not the intention of the parties that the power of naming an arbitrator should be personal to the five lessees.

As to the more general objection. I consider it to be quite settled that this court will not entertain a bill for the specific performance of an agreement to refer to arbitration; nor will, in such case, substitute the master for the arbitrators, which would be to bind the parties contrary to their agreement. The demurrer must be allowed.

[\*424]

\*ANONYMOUS.

1825, 15th November.—*Creditor.—Costs.*

Creditor proceeding at law against the executor, after a decree, allowed his costs at law incurred previous to notice of the decree, but not his costs of the motion to restrain his proceedings.

UPON a motion to restrain a creditor from proceeding at law against an executor, after a decree against the executor, the Vice-Chancellor gave the creditor his costs at law, up to the time of his having notice of the decree; but, after consulting with the register, refused to the creditor the costs of the motion.

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 DREWE v. BIDGOOD.

1825, 10th and 14th November.—*Satisfaction.*

A. being indebted, as his father's executor, to the trustees of his sister's marriage settlement, settled on her and her children a sum to a larger amount, in consideration of the natural love and affection he bore them: held that it was not a satisfaction of the debt.

THE plaintiff, Dorothy Drewe, upon the death of her father, Charles Bidgood, became entitled, under his marriage settlement, to a sum of 463*l.* 15*s.* 9*d.* She intermarried with the plaintiff, John Rose Drewe, in the lifetime of her father: and, by the settlement made on her marriage, every provision to which she should become entitled under her father's marriage settlement was assigned to trustees, (one of whom was her brother, C. Bidgood, the younger,) for her separate use, with power to her to dispose of the same by deed or

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will; and, in default of her disposition, upon trust for the children of the marriage, equally, at the usual periods.

Charles Bidgood, the father, died in March, 1797, having in his hands the funds out of which the 463*l.* 15*s.* 9*d.* was payable. He, by his will, left two \*legacies of 10*l.* each to Mr. and Mrs. Drewe for mourning, [\*425] and appointed his son, Charles Bidgood, his executor and residuary legatee. By an indenture, dated in August, 1797, made between Charles Bidgood, the younger, and one John Pitman, of the one part, and William Drewe of the other part, after reciting that C. Bidgood, the younger, for the natural love and affection which he bore to his sister, Dorothy Drewe, and her two children, Dorothy Drewe, the younger, and Charles Drewe, and with a view to make some provision for Dorothy Drewe, the elder, separate from her husband, and for her children, had lately, with his own moneys, amounting altogether to 1,994*l.* 16*s.* 9*d.*, purchased divers sums of stock, amounting in the whole to 4,117*l.* 10*s.* three per cent. consolidated bank annuities, in the names of himself and John Pitman; Charles Bidgood, the younger, and J. Pitman, covenanted and declared, to and with William Drewe, that they would stand possessed of the stock, and of the interest and dividends thereof, in trust for Mrs. Drewe, for her separate use, during her life, and, after her decease, in trust for Dorothy Drewe, the younger, and Charles Drewe, and the survivor of them: but, if they should both die in their mother's lifetime, then in trust for such persons as the mother should, by deed or will, appoint, and, in default of appointment, in trust for her executors or administrators. The deed contained the usual clauses for the indemnity and reimbursement of the trustees.

Charles Bidgood, the younger, died on the 7th of January 1813, having appointed the defendant Ann Bidgood, his widow, his sole executrix.

\*The bill was filed for payment of the 463*l.* 15*s.* 9*d.* out of the as- [\*426] sets of Charles Bidgood, the father.

The defendant, in her answer, submitted that the 463*l.* 15*s.* 9*d.* had been, in the lifetime of Charles Bidgood, the younger, discharged or satisfied, or ought to be presumed to have been discharged and satisfied; for that Charles Bidgood, the elder, died in 1797, and, by his will, left no more to Mr. and Mrs. Drewe than a small legacy of 10*l.* each, which they received, without making any claim or demand on Charles Bidgood, the younger, for payment of the 463*l.* 15*s.* 9*d.*, or any other sum of money as being due to them from the estate of Charles Bidgood, the elder; although they well knew that Charles Bidgood, the elder, had, in his lifetime, received that sum; and that, although Charles Bidgood, the younger, lived for sixteen years after his father's death, no demand was ever made on him for payment of the 463*l.* 15*s.* 9*d.*, or any part thereof, or any interest for the same, as a debt due from the estate of Charles Bidgood, the elder; and Charles Bidgood, the younger, was suffered to apply and dispose of the property and effects of Charles Bidgood, the elder, without any demand having been made on him for payment of such sum of money, as

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a debt : that, after the death of Charles Bidgood, the elder, the defendant had understood and believed that Charles Bidgood, the younger, from motives of kindness and affection to Mrs. Drewe, his sister, and her family, gave her a sum of 2,000*l.*, which was, at different times, and in different sums, invested in the purchase of stock in the public funds, which stock was transferred into the names of Charles Bidgood, the younger, and John Pitman, upon trust [\*427] for the benefit of \*Mrs. Drewe and her children, and which the defendant submitted was a satisfaction of the 463*l.* 15*s.* 9*d.*, if the same was really due ; that she had found, amongst the papers of her late husband, several letters, which were written by Mr. Drewe to him, very shortly after the death of Charles Bidgood, the elder, referring to advances made by Charles Bidgood, the younger, to Mr. Drewe and his wife, or of money which he gave to them, or permitted Drewe to receive, or retain and apply, as a gift or bounty, for the benefit of Drewe and his wife, and their family, making up or towards the sum of 2,000*l.*, and expressing Drewe's gratitude for the liberal and generous conduct of Charles Bidgood, the younger, towards his wife and their children ; and which letters were as follows :—

London, 14th May 1797.

"Dear brother :—I have, by Monday's post, received from Mr. Richard, on your account, bills, value 365*l.* 10*s.*, which, with 720*l.* 2*s.* the purchase money for your moiety of the tithes, your sister gives me your very generous order to lay out in three per cent. consols, in the joint names of yourself and John Pitman, in trust for her and our children. I beg you will accept my grateful thanks for your kindness to them. They deserve our love, and you have the heartfelt pleasure of promoting their happiness. Enclosed, you have the receipts for the stock I have already bought, and hope to be able very soon to lay out the remaining balance due for the tithes, as I am extremely anxious that what you are now doing for your sister shall be applied to the best advantage. If you will sign the enclosed paper and return it to me, I shall [\*428] be able to receive \*your dividend on your Old South-Sea annuities, as soon as the probate of your father's will is sent me, or exhibited at the South-Sea House."

£. s.		£. s. d.
" 365 10 remitted . . . . .	bought	745 18 4 consols.
" 487 10 part of 720 <i>l.</i> 2 <i>s.</i> per J. R. D. . . .	1,000 — —	do
		<hr/> £1,745 18 4 <hr/>

"Stock bought in the names of C. Bidgood and }  
John Pitman, in trust for Dorothy Drewe." }

London, 27th May 1797.

"Dear brother :—I have two letters from your sister, one enclosing an order for receiving your dividend, amounting to 64*l.* 10*s.*; the other, with bank

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bills for 50*l*. These two sums are laid out in the consols, agreeably to your friendly direction ; and enclosed you have the stock receipt, and a letter of attorney for me to receive the dividends, which you and Mr. Pitman will be so obliging as to execute. I am extremely obliged to you for your anxiety to invest a further sum in the stocks on this account, which, certainly, at the present low price of the funds, is a very great object to us if it could be accomplished. My brother Richard, I am sure, will contrive to advance money upon this important occasion. If you wish to accomplish this friendly business before you join your regiment, I can only express my grateful acknowledgment for the kind part you are acting, and remain your

“ Affectionate brother, J. R. Drewe.”

\*6th June 1797. [\*429]

“ Dear brother :—I have heard from your sister since you left Rockbeard ; and hope this will find you safe and well with your regiment. Finding it was your wish to provide the money for the funds immediately, and being informed of the difficulty of borrowing in the country, I have applied to a friend in town, who is so obliging as to advance the 800*l*. on your note, which I have inclosed for you to sign. This has enabled me to lay out the whole sum of 2,000*l*. in the consols, in the joint names of yourself and Pitman, in trust for your sister and my children ; and the enclosed, with former receipts, makes up the whole sum. You see the note is on demand ; but, should it be convenient to you to send the money in three months, it will make no material difference, as it will remain in the hands of my friend.”

	£.	s.		£.	s.
“ May 12. Bills from Exon . .	365	10	Stock receipt	365	10
— — Paid for tithe . . .	720	—	Do. . .	487	10
— 26. Bills . . . . .	54	—	Do. . .	323	10
— 27. Dividend O. S. S. A. .	64	10	Do. . .	116	—
June 2. Borrowed on C. B. account	800	—	Do. . .	798	8
	<hr/> £. 2,000 —			<hr/> £. 2,000 —	

“ The above is a state of the trust account.”

The answer then set forth the deed of August 1797, and insisted that, by the means aforesaid, the 463*l*. 15*s*. 9*d*. had been fully satisfied.

Mr. *Sugden*, and Mr. *Merivale*, for the plaintiffs :—It cannot be contended that the deed of 1797 was \*made in satisfaction of the 463*l*. 15*s*. 9*d*. That deed recites that it was made for the natural love and affection which C. Bidgood, the younger, bore to his sister and her children, and with a view to make a provision for them. No allusion is made to the claim of Mrs. Drewe under her father's settlement. The letters set forth in the answer afford the strongest evidence that the settlement of 1797, was not made in consequence of any bargain between the parties, but that it entirely

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emanated from the affection of the brother to his sister. Besides, Mrs. Drewe was under coverture when that settlement was made, and the rights of the children would be materially altered by it. For, under their mother's settlement, they would take vested interests on coming of age; but, under the deed of 1797, the whole goes to the survivor.

Mr. *Hart*, and Mr. *Roupell*, for the defendant, relied on the expressions in the letters, and contended that it was clear, from the plaintiffs having abstained from making any demand upon Charles Bidgood, that they were conscious he intended the settlement made by him to be a satisfaction of the 463*l.* 15*s.* 9*d.*; and that as Drewe borrowed for him the 800*l.*, to enable him to make the settlement, it could not be supposed that he meant to leave himself in a situation to be called upon for the 463*l.* 15*s.* 9*d.*

The VICE-CHANCELLOR:—The deed of gift expressly states that the 4,117*l.* 10*s.* was purchased by Charles Bidgood, the younger, with his own moneys, and for the natural love and affection which he bore to his sister and [\*431] her children, who had \*no immediate interest in the 463*l.* 15*s.* 9*d.* I am, therefore, concluded from presuming that he meant, by this gift, to pay a debt due from his father's estate, whatever the probability may be in that respect.

#### HILL v. REARDON.

1825, 14th and 21st November.—*Jurisdiction*.—*Appeal*.

No appeal lies to the court of chancery from the decisions either of the privy council, or the commissioners under the acts and conventions for indemnifying British subjects for the confiscation of their property by the French revolutionary government.

THIS was a bill claiming the benefit of an award, made in favor of the executor of James Fanning, by the commissioners under the conventions and act of parliament for settling the claims of British subjects, whose property had been confiscated during the French revolution.

The material facts of the case are fully stated in the judgment, and in the report of a motion for an injunction made in this cause, in Mr. Jacob's Reports, p. 84.

The only question which the Vice-Chancellor thought it necessary to have argued, at the hearing, was, whether the court had any jurisdiction to alter the award which had been made, on appeal, by the privy council.

The *Solicitor General*, and Mr. *Wakefield*, for the plaintiff.

Mr. *Hart*, and Mr. *Simpkinson*, for the defendant Devereux, the executor of Fanning, and Mr. *Fonblanque*, and Mr. *Roupell*, for a party to whom the executor had assigned his interest, insisted that this court had no jurisdiction.

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1st. Because the conventions and act of parliament provided that the claims should be settled by the \*commissioners, subject only to [\*432] the control of the king in council ; but gave no jurisdiction to the court of chancery, except on one single point, which did not arise in this case ; and the decision of the commissioners, subject to the control of the king in council (which had been exercised in this case) was decisive, not merely as to whether any claim could be made, but also as to the right of the party who made it :

2d. Because the plaintiff had made no claim within the time limited by the conventions and act of parliament.

Mr. *Wray* appeared for the Attorney General, who was made a defendant in respect of a right which would accrue to the crown, as to a part of the fund awarded, in case the plaintiff was entitled.

The *Solicitor General*, and Mr. *Wakefield*, for the plaintiff, insisted, 1st, that the award of the commissioners must be considered as having decided no more than that a certain sum was due to the representative of Mr. Fanning, and not as having settled the question whether his real or his personal representative was the party beneficially entitled : that that question was now, for the first time, raised in this suit, and could not have been properly raised or decided before the commissioners : that the executor must be considered as a trustee of the fund for the parties, who would, in a court of equity, establish their claim to it.

2d. That the fund claimed by the plaintiffs was already in the hands of the court, having been paid into it by the commissioners, under the authority of the act of parliament.

\*3d. That the appeal to the privy council was only upon the ques- [\*433] tion, whether there had been such a loss sustained as gave a claim to compensation ; and was not intended to usurp the equitable jurisdiction of the court of chancery, in case the party who had the legal title to receive the fund could be shown to be a trustee for other parties.

The VICE-CHANCELLOR :—By the fourth article of the definitive treaty of peace between England and France, concluded at Paris on the 30th of May, 1814, it was stipulated that certain commissioners should be appointed for the examination of the claims of British subjects upon the French government, for the value of property, moveable or immoveable, which had been illegally confiscated by the French authorities since the year 1792. By a convention, concluded between England and France in pursuance of the ninth article of the definitive treaty of peace between the allied powers and France, made at Paris on the 20th November, 1815, it is stipulated that, for the examination and liquidation of the claims of British subjects on the French government, a capital, producing an interest of 3,500,000 francs, commencing from the 23d of March, 1816, should be inscribed, as a fund of guarantee, in the great book of the public debt of France, in the names of four commissioners, one half British, and the other half French ; and, by the same convention, certain pe-

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riods were appointed for bringing forward the claims of British subjects, after which they were no longer to have the benefit of the liquidation provided by this convention.

[\*434] \*Certain other conventions were afterwards concluded, between

Great Britain and France, for the purpose of giving effect to the last-mentioned convention: and, by several commissions under the great seal of the united kingdom of Great Britain and Ireland, his majesty, the late king, was pleased to appoint certain commissioners for the purpose of acting, on behalf of his majesty, according to the provisions of these conventions.

By another convention, signed at Paris on the 25th of April, 1818, for the final arrangement of the claims of British subjects on the French government, it was agreed that, in order to effect the payment and entire extinction of the capital and interest which might be awarded to the British subjects, there should be inscribed, in the great book of the public debt of France, a further perpetual annuity of 3,000,000 francs, which should bear interest from the 22d of March, 1818, and should be equally applicable, with what remained unapplied of the former sum of 3,500,000 francs, under the convention of 1815, to the payment of the claims of British subjects.

By 59 Geo. 3, c. 31, intituled; "An act to enable certain commissioners fully to carry into effect several conventions for liquidating claims of British subjects and others against the government of France," after reciting to the effect aforesaid, and that the said commissioners so appointed having proceeded in the discharge of their duty, they caused to be inscribed in a register, provided by them for that purpose, the names of all the claimants who had presented themselves within the period prescribed by the conventions, and they

[\*435] liquidated and caused to be paid to the claimants \*certain sums, producing, in the whole, 2,945,895 francs of yearly value, deducting therefrom two per cent. on the amount of all claims liquidated, so that in the year 1818 a sum, producing 554,105 francs yearly revenue, still remained of the said fund of guarantee; it is enacted that, in order to enable the said commissioners to complete the examination and liquidation of the claims of such persons who should have caused their names and claims to be inserted in the aforesaid register, it should and might be lawful for the said commissioners to apportion, divide and distribute the said sums of money, so provided by France as aforesaid, to and amongst the several claimants whose names are duly entered in the said register, and whose claims should be admitted by them in manner therein more particularly mentioned.

By the 10th section of the act, it was provided that, if questions should arise on the construction of these several conventions, any claimant dissatisfied with the judgment of the commissioners should be at liberty to appeal therefrom to his majesty in council, subject to the conditions and restrictions therein stated: and, by the 15th section of the act, it was further provided that, in case any dispute should arise between any parties interested in any such claims, and the commissioners should not be able to decide as to the persons legally entitled to

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receive the liquidated amount, then it should be lawful for the commissioners, under the authority of his majesty's principal secretary of state for foreign affairs, to sell so much of the capital inscribed in the great book of France as as aforesaid, as would be equal in amount to such disputed claim, and to direct that the sum arising from such sale \*should be paid into the [\*436] Bank of England, in the name of the accountant general of the court of chancery, which said court, upon motion or petition of any person making claim to such money, should have power to decide upon such disputed claims, and to make such order in the premises as should seem just.

The defendant, James Edward Devereux, previous to the passing of the act of the 59th of the late king, caused a claim to be duly entered in the register kept by the commissioners, as executor of a Mr. Fanning, who died in 1605, in respect of moveable and immoveable property which had been confiscated by the French government in 1792; and, after the passing of the act of the 59th of the late king, the commissioners proceeded to examine his claim, and, on the 12th of October, 1819, awarded that Mr. Fanning, having prior to the confiscation sued out and obtained letters of naturalization and nobility in France, his loss by confiscation did not fall within the true construction of the said several conventions.

From this judgment of the commissioners the defendant Devereux appealed to the king in council; and, by an order, made on the 10th of October, 1820, the award of the commissioners was rescinded, and the commissioners were directed to proceed to examine and ascertain the amount of the loss sustained by Mr. Fanning, by such confiscation of his property, whereof all persons whom it might concern were to take notice, and govern themselves accordingly. In obedience to this order of the king in council, the commissioners afterwards proceeded in the examination; and, in respect of the confiscated property, awarded, at different times, large sums of money to the defendant, Devereux, as executor of Fanning.

\*The present bill was filed, on the 17th of March 1820, by C. Hill [\*437] and Ann his wife, claiming, in right of the plaintiff, Ann, to be entitled to one-half of the sums so awarded to the defendant, Devereux, upon the ground that, by the laws of France, Mr. Fanning had not the power of disposing of this property by his will, and that one moiety of the property confiscated had belonged to his wife, who died in his lifetime, and had descended, first to the children of the marriage, and, through them, to the plaintiff, Ann, as heiress to her and to her children; and, as to the other moiety, that, Fanning having died without heirs, it had devolved upon the crown. The bill named as defendants, Mr. Devereux, and Mr. Reardon to whom Mr. Devereux had assigned his interest, and the Attorney General, and prayed the declarations of the court accordingly. Upon the opening of this case, a preliminary objection was taken, that this court had no jurisdiction, there being no right of appeal given by the 59th Geo. 3, to this court, from the decisions of the commissioners. It was argued, for the plaintiff, that the decision of the commissioners was, in effect,



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nothing more than a judgment that those who represented Mr. Fanning were, as against the French government, entitled to the compensation awarded, and that it remained to be settled, by proper judicial authority, who those representatives were.

On the hearing of the cause, I expressed my opinion that this court had no jurisdiction to entertain the question raised by the present bill, and I continue of that opinion. Those who claim under Mr. Fanning in respect of [\*438] the violence and injustice of the French \*revolutionary government, sustained a loss which was beyond the reach and remedy of any court of justice. The title to relief is wholly derived from the conventions and the act of parliament referred to, and is to be obtained only through those conventions, and according to the provisions of the act of parliament; and there can be no appeal to any court of justice against the judgment of the commissioners, unless it be specially provided by the conventions and statute. Not only is no such right of appeal expressly given, but it is, by necessary intendment, plainly excluded. The 15th sect. of the 59th Geo. 3, enables the commissioners, in case of conflicting claims to any compensation which they may have awarded to be paid by the French government, to call in the assistance of the court of chancery to decide between the claimants, if they think fit to do so, and the measure to be sanctioned by the secretary of state for foreign affairs, and the lords of the treasury. If the legislature had intended that the court of chancery should have jurisdiction in all cases to review the decision of the commissioners, with respect to the party entitled to the compensation awarded by them, this provision could not have found its way into the statute, and this court has therefore no jurisdiction.

In this case, also, it does not appear that the plaintiffs ever presented themselves as claimants before the commissioners, or caused their names and claims to be duly inserted in the register kept by the commissioners, within the periods prescribed by the several conventions, so as to entitle themselves to the benefit of the liquidation provided by the conventions and statute, if the court could have entertained jurisdiction.

[\*439] \*Let the bill be dismissed, but without costs, because of the novelty and importance of the question, and because the defendants might have had the opinion of the court upon the question of jurisdiction by a demurrer.[1]

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STEVENS V. GUPPY.

1825, 24th November.—*Title.*—*Vendor and purchaser.*

Where the title to an estate was derived from a person who entered as heir, under the impression that his ancestor's will was void, a purchaser was not compelled to complete his contract, without production of the will, or evidence of its contents.

THIS suit was instituted for the specific performance of a contract for the

[1] S. C. Jac. 84, 2 Russ. 645. Et vide, *Lloyd v. Lord Trimlestown*, 4 Sim. 296. *Ellis v. Earl Grey*, 6 Sim. 214.

1823.—*Stevens v. Guppy.*

sale of an estate, part of which was copyhold, and had been purchased, by the present vendor, from one Thomas Hickmans. It was alleged by the purchaser that the father of Thomas Hickmans had devised this copyhold by his will, and that his will ought to be produced.

On the title being referred to the master, Thomas Hickmans made an affidavit, in support of it, in the following words:—

“Thomas Hickmans maketh oath, and saith that he was the owner of a piece or parcel of garden ground, of free copyhold tenure, situate at Cosely, in the county of Stafford, held of the manor of Sedgly, which this deponent sold to Thomas Smith, of Cosely, farmer, about the year 1806; that deponent inherited the said piece of ground from his father, Wm. Hickmans, deceased, together with other copyhold premises held of the same manor, and was duly admitted in court to the same as tenant to the lord of the said manor; that his father made and signed some paper as and for a will, which was prepared and written out by one Isaac Smith, \*a sencer- [\*440] maker, of Cosely, now deceased, and the deponent took the said paper or will to Mr. Brettel, the steward of the manor, at the court at which this deponent was so admitted tenant; and that the said Mr. Brettel looked at and read over the said will, and said it was not worth a damn, and that the deponent, as heir of his father, was entitled to all the said copyhold premises of which his father died possessed; nevertheless this deponent was willing and consented that Elizabeth Hickmans, his sister, now deceased, should have one house, part of the said copyhold premises, for her life, agreeable to the intention of deponent's father, expressed, as deponent believes, in the said paper-writing or will, and deponent accordingly suffered the said E. Hickmans to have the rents of the said house as long as she lived; but she had no part of the rents of the said garden ground, so sold by deponent to the said Thomas Smith: and deponent further saith that he cannot set forth the contents of the said will; for that he never saw it after the time he took it to the said court, where he left it, as being of no use; and that the said will was never proved in any court whatever.”

The master reported against the title; upon which the vendor excepted to the report.

Against the exception, it was contended that the purchaser could not be compelled to complete his contract, unless the will was produced, if it was in existence, or proper evidence given of its contents, in case it could not be found; because the will might hereafter be produced, or evidence be given of its contents, and the opinion of the steward be shown to be erroneous.

*Mr. Heald, Mr. Preston, M. Lovat, Mr. Romilly, and Mr. Pember-* [\*441] *ton*, appeared for the different parties.

The VICE-CHANCELLOR:—It is plain, from this affidavit, that the father of Thomas Hickmans had made some testamentary declaration with respect to this copyhold in his will: and a purchaser cannot be compelled to take the title, under Thomas Hickmans, without full proof of the contents of that will.

Exception overruled.

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 1825.—The Attorney General v. Pembroke Hall.
 

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## THE ATTORNEY GENERAL v. PEMBROKE HALL.

 1825, 24th November.—*Charity.*

A corporation, which was bound to pay out of the revenues of charity lands a certain annual sum to a college, in the 4th of James the first conveyed to the college lands then of that annual value, in satisfaction of the annual sum.

The lands so conveyed, by accidental circumstances, became of much greater value in proportion than the land which were reserved by the corporation for the other purposes of the charity; yet the court will not, at this day, undo an arrangement which was fair at the time, and had the approbation of the executor of the founder.

THIS was an information to set aside a lease, granted in 1607, by the wardens of St. Bees school to the master and fellows of Pembroke Hall, Cambridge.

Edmund Grindall, archbishop of Canterbury, in the year 1583, under the authority of letters patent from queen Elizabeth, appointed that lands of the annual value of 50*l.* should be purchased and given to the warden and governor of St. Bees school, and their successors, for ever, for the maintenance of the said school, and for the relief of poor scholars going from [\*442] \*thence to the universities of Oxford and Cambridge: and he directed that 20*l.* should be applied for the finding of one fellow and two scholars in Pembroke Hall, in Cambridge, and 20*l.* to the schoolmaster of St. Bees, and 3*l.* 6*s.* 8*d.* to the usher, and 20*l.* to the receiver, and 13*s.* 4*d.* for a yearly dinner for the governors; and that the residue, together with penalties, after reparations and other necessary charges, should form a stock; and, when the stock should amount to 80*l.*, should be employed in purchasing other lands, of the yearly revenue of five marks, for the relief of another poor scholar in Pembroke Hall; and, when a further like accumulation of stock should be made, that it should be applied in the purchase of other lands for the relief of a poor scholar in Queen's College, Oxford; and so, from time to time, as the stock should increase and other lands should be purchased, the revenues should be applied for the further relief of poor scholars, successively, in Cambridge and Oxford.

On the 16th of June 1585, certain lands, called Palmer's Fields, which then produced a clear yearly rent of 24*l.*, were purchased and conveyed to the warden and governors of St. Bees school, to form part of those which were to produce the 50*l.* a year. On the 31st of May 1606, in the 4th year of king James the first, these fields were leased, by the wardens of St. Bees school, to Reynold Gleydell, the elder, and Reynold Gleydell, the younger, for 99 years, at the same rent of 24*l.* a year. Other lands, to the yearly value of 30*l.*, were afterwards purchased and conveyed to the warden and governors of the school, so as to make up the yearly sum of 50*l.* In 1594, [\*443] \*there appeared to be a surplus of the revenues of the charity lands in the hands of the receiver, amounting to 40*l.*; and that sum, together with 26*l.* supplied by the executors of the archbishop, was laid out in the pur-

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 1825.—The Attorney General v. Pembroke Hall.
 

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chase of other lands, of the yearly value of 4*l.* for the maintenance of another scholar in Pembroke Hall.

By an indenture, dated the 1st of June 1607, and made between the warden and governors of St. Bees school, of the one part, and the master and fellows of Pembroke Hall, Cambridge, of the other part (and to which it appeared, by the recitals, that John Scott, the surviving executor of the archbishop, was also a party,) reciting that the archbishop, a little before his death, when he made his statutes for the government and sustentation of one fellow and two scholars of the said college, did think that the master and fellows of the said college had not sufficient license in mortmain to take to them and their successors the 20*l.* a year which he limited to them, and, for that reason, did appoint the warden and governors of St. Bees school to pay to them such yearly sum: and that, since the death of the archbishop, there had been, by consent as well of the said master and fellows as of the executors of the archbishop, a license in mortmain procured, enabling the said master and fellows to purchase and receive, to them and their successors for ever, lands, tenements and hereditaments not exceeding the yearly value of 80*l.*; it was witnessed that, for the better assurance of the 20*l.* a year appointed by the archbishop, and of the additional 4*l.* a year produced by the lands since purchased, the warden and governors of St. Bees did demise, unto the \*master and fellows of Pembroke Hall, the lands called Palmer's Fields, [\*444] (so held on lease by the Gleydells at 24*l.* a year,) for the term of 1,000 years; thence next ensuing, at the yearly rent of a red rose, at the feast of the nativity of St. John, if lawfully demanded: and the warden and governors of the school covenanted that the 24*l.* a year, reserved by the said lease to the Gleydells, should, during their term, be paid to the master and fellows of Pembroke Hall; and, after the determination of Gleydell's lease, that they would, during the remainder of the term of 1,000 years, pay yearly the sum of 24*l.* to the master and fellows of Pembroke Hall, for the maintenance of the fellow and three scholars in that college. The indenture also stated that John Scott, the surviving executor of the archbishop, in order to secure, to the fellow and three scholars of the archbishop's foundation, the same benefit, privileges and commodities as any other fellows and scholars enjoyed in that college, had agreed to pay and bestow, out of the estate of the archbishop, a sum of 200*l.* to the master and fellows of Pembroke Hall; and the master and fellows, on their part, in consideration of this sum of 200*l.*, and of the said demise of the said lands called Palmer's Fields, covenanted that the fellow and three scholars should enjoy the like benefits, privileges and commodities as the other fellows and scholars of the college; and that they would deliver to John Scott a counterpart of this indenture.

The information was filed against the master and fellows of Pembroke Hall and the warden and governors of St. Bees school; and it stated that the rent of the lands called Palmer's Fields had increased to \*the [\*445] annual sum of 500*l.*, whilst the other lands, retained by the warden

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1625.—*The Attorney General v. Pembroke Hall.* \*

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and governors of the school were now only of the annual amount of 124*l.* 19*s.* ; and it charged that the original lease to the Gleydells, and also the lease to the master and fellows of the college, were both fraudulent, and that, at the time of granting the same, the lands called Palmer's Fields were of much greater value than 24*l.* a year ; and that, notwithstanding the engagement, on the part of the master and fellows of Pembroke Hall, that the scholars of the archbishop's foundation should have the like benefits, privileges and commodities as any of the fellows and scholars of the college, the said fellow and scholars of the archbishop's foundation had enjoyed only certain limited benefits, much inferior to the other fellows and scholars.

It also stated that, in 1612, a bill was filed in this court by John Scott against the warden and governors of St. Bees school, touching these leases, and that an order was made in that cause, on the 21st of November 1612, as follows :—" Whereas, upon the hearing of this cause the 22d of October last, it appeared that one Reginald Cleydall hath gotten a lease of some of the school lands at an under-rent ; and, as it was then alleged, of the master and fellows of Pembroke Hall, in Cambridge, for 1,000 years, in reversion of the said Cleydall's lease : It is, therefore, ordered, by the Lord Chancellor, that a subpœna be awarded against the said Cleydall to bring his said lease into court, to be viewed and considered of as shall be meet. And his lordship will also be pleased to write his honorable letters unto the said master and fellows of Pembroke Hall, to bring their said lease into this court, to [\*446] be also seen and \*perused as shall be fit ; and that such order may be taken thereupon, touching both the said leases, as shall be meet."

No further proceedings appeared to have been taken in that cause touching these leases.

The information prayed that the lease to the master and fellows of Pembroke Hall might be set aside and cancelled : or, if the court should be of opinion that it ought not to be cancelled, then that it might be declared that the master and fellows held it only as a security for the payment to them of the annual sum of 24*l.*, or such further sum as they might be entitled to, in respect of the increased value of the estate, in proportion with the other objects of the charity ; and that they were trustees of the surplus for the benefit of the charity : and that the fellows and scholars of the archbishop's foundation might be declared entitled to the like benefits, and put upon an equality, in all respects, with the other fellows and scholars of the college.

The master and fellows of the college, by their answer, denied the fraud, and stated that the fellows and scholars on the St. Bees foundation had always enjoyed the same benefits, and been on the same footing as the other fellows and scholars ; and that, so far from the other fellows of the college having been benefited by the archbishop's foundation, they had, in fact, been injured by it ; inasmuch as the present St. Bees fellow, during the 26 years he had held the fellowship, had been paid 939*l.* more than was produced by the rents, profits and fines received for Palmer's Fields.

1825.—Horn v. Horn.

\*The information now came on to be heard.

[\*447]

The *Solicitor General*, and Mr. *Pemberton*, for the informant.Mr. *Horn*, and Mr. *Simpkinson*, for the defendants.

The VICE-CHANCELLOR :—It appears that, in making up the 50*l.* a year in land according to the archbishop's appointment, the lands called Palmer's Fields were computed, by his executors, at the rent of 24*l.* a year only, and there is, therefore, no reason to suppose that the lease which was granted a few years afterwards to the Gleydells at the same rent of 24*l.* a year, was a fraudulent lease. Still less can it be supposed that the warden and governors of St. Bees school would fraudulently grant to the college an undue proportion of the revenues of the charity, to the prejudice of their own establishment. No motive can be assigned for such conduct : and it is plain, by the recitals in the lease to the college, to which the executor of the archbishop was a party, that the purpose of all parties was to give to the college that proportion of benefit in land which the archbishop had given in money, and which the archbishop would himself have given in land, if the college had, before his death, been capable of holding the land in mortmain. It has happened that the land so allotted, by the warden and governors of the school, to the college has, from accidental circumstances, increased in annual value in a much greater proportion than the land which was reserved by the school : and the principal purpose of the present information is, to undo this arrangement and to make a new and proportionable division between the several objects of the charity.

\*I cannot think it the office of a court of equity, at the distance of [\*448] more than two-centuries, to undo an arrangement which was perfectly fair at the time between the contracting parties, and was sanctioned with the full approbation of the executor of the founder, and has become unequal only from accidents arising out of the course of time. The information must, therefore, in this respect, be dismissed. As to the other point : the fellow and three scholars of the archbishop's foundation are, by the indenture of the 4th of James, plainly entitled to the like benefits, privileges and commodities with the other fellows and scholars of the college ; and the court will make a declaration accordingly.[1]

## HORN v. HORN.

1825, 23d July ; 23d November ; 7th December.—*Vendor and purchaser*.—*Legacy*.

Where legacies were charged upon the real estates of a trader, and his devisees and executor sold part of the real estates before the debts were paid ; held that the purchaser, notwithstanding the 47 Geo. 3, c. 74, was liable to see his purchase money applied in payment of the legacies.

[1] Where the trustees, in 1725, alienated charity lands, on an information filed in 1835, it was held, that it was incumbent on those claiming the benefit of the alienation to show that the transaction was beneficial for the charity, and not having done so it was held invalid : but as this was

1825.—Horn v. Horn.

THIS was a bill, by legatees whose legacies were charged upon the real estates of the testator, for payment of their legacies. Some parts of the real estates had been sold ; and the purchasers of those parts were made defendants.

The testator was, at the time of making his will and of his death, a trader. He devised his real estates, subject to the payment of legacies, to his son, Joseph Horn, in fee, whom he appointed his sole executor.

Horn sold part of the estates to one Muckinder, for 475*l.*, and he [\*449] received 350*l.*, part of the \*purchase money, and applied 152*l.* of it in part payment of one of the legacies charged upon the real estates, although, at that time, several of the testator's debts remained unpaid. He afterwards conveyed all his estate and effects (subject to the legacies) to trustees for the benefit of his creditors.

When the cause came on, for further directions, the court referred it to the master, to inquire whether the 350*l.*, or the 152*l.*, had been duly applied, or was still applicable, to pay the legacies charged upon the real estates. The master reported that neither of those sums had been duly applied, or was now applicable in satisfaction of the legacies charged by the testator upon his real estates, inasmuch as the debts of the testator had not been fully satisfied and paid, and inasmuch as the other legatees had not been paid rateably with the legatee who had been paid the 152*l.*

The purchaser excepted to the report. On the hearing of the exception, the question was, whether the purchaser ought to have seen that his purchase money was applied in payment of the legacies ; or whether, as the real estate of a trader was by the 47 Geo. 3, c. 74, subject to debts, generally, the purchaser was discharged from the obligation to see that his money was applied in payment of the legacies, as he would have been if the estate had been charged by the testator with payment of his debts.

Mr. *Horne*, Mr. *Preston*, and Mr. *Spence*, for the plaintiffs :—The purchaser must have looked to the will ; and he could not do so without seeing that the legacies were expressly charged on the estates. Ought he not then [\*450] \*to have inquired whether the legacies were paid ? This case is not within the 47 Geo. 3, c. 74. Where debts are specified in the will, or in a schedule annexed to it, they are specific charges, and the purchaser is clearly bound to see that the purchase money is duly applied in discharge of them. The 47 Geo. 3, could never intend to effect so great an injustice as to put legatees, whose legacies are specifically charged upon the estate, completely at the mercy of the devisee or trustee, who might sell the property and misapply the money. The case must be decided on the general principle. The only object of the statute was to put simple contract debtors of traders in the same situation as to his real estates, and to give them the same rights over it,

a case of hardship, time was given to make application to the attorney general, who was not bound to contend for his strict rights which ought to be used with forbearance. *Attorney General v. Brettingham*, 3 Beav. 91.

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 1825.—*Horn v. Horn.*


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as specialty creditors had at common law. If a bill were filed for the administration of assets before the sale took place, it would be notice to the purchaser, and he would be bound to see to the application of the purchase money, even if there were only a general charge of debts. Lord Thurlow decided that, where a bond creditor filed his bill before the sale, the land was not discharged, because it would interfere with the administration of the assets by the court.

*Mr. Agar, Mr. Parker, and Mr. Duckworth*, for the purchaser:—If the purchaser is not discharged in such a case as this, it is clear that there must always be a suit in chancery, in order to enable a proper title to be made to the real estate of a trader; and the act of parliament would be nugatory. The question is, whether the effect of the act of parliament is not to make the real estates of traders assets for the payment of their debts, in the same manner as if there were a general charge of debts by will. If so, then all the rules \*applicable to a general charge of debts by will must have their effect [\*451] and, amongst others, the rule that where there is a general charge of debts the purchaser shall not be bound to see to the application of the purchase money. Here, as in every other case, the debts were a charge prior to the legacies. They were unpaid at the time of this sale, and, therefore, the purchaser was not bound to see to the application of the money which he paid for the estate.

*Mr. Willis*, for a mortgagee.

*The VICE-CHANCELLOR*:—The only effect of the statute 47 Geo. 3, sess. 2, c. 74, is to render the heir and devisee of a trader liable to the same suits in equity, at the suit of a simple contract creditor, as they were before liable to at the suit of a specialty creditor, where the heir was bound. But the purchaser from an heir or devisee being, before the statute, bound to see to the application of his purchase money in satisfaction of legacies charged on the land by the deviser, notwithstanding the existence of specialty debts which were to be paid out of the land, and the statute having made no difference in this respect, the purchaser from the heir or devisee of a trader must continue bound to see to the application of his purchase money in satisfaction of legacies charged on the land, notwithstanding the statute by which simple contract debts are also to be paid out of the land.[1]

The decree directed the purchaser to pay into court the whole amount of his purchase-money, with interest at four per cent., and the remaining part of the testator's real estates to be sold.

[1] Vide *Watkins v. Cheek*, ante 199—206, and note *ibid*.



1825.—Const v. Barr.

[\*452]

\*CONST. V. BARR.

1825, 3d and 10th December.—*Practice*.—*Sequestration*.

Where a party is in custody of the warden of the fleet, under process from common pleas, and is detained upon an attachment from this court, he must be brought up by habeas corpus to the bar of the court, and turned over to the warden of the fleet, before a sequestration can issue.

A MOTION was made in this cause to discharge an order for a sequestration, for irregularity. The irregularity complained of was, that the defendant, being in the custody of the warden of the fleet, under process from the court of common pleas, and detained upon an attachment from this court, had not, before the sequestration issued, been brought up, by habeas corpus, to the bar of this court, and turned over to the warden of the fleet.

The Vice-Chancellor, upon the authority of the cases of *Knowles v. Chapman*, 1st of May 1819, and *Dawson v. Collings*, 30th of June 1820, discharged the sequestration.

Mr. *Wakefield* supported the motion.

Mr. *Roupell* opposed it.

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[\*453]

\*COCKBURN V. RAPHAEL.

1825, 10th December.—*Practice*.—*Receiver*.

The court will appoint a receiver in India of a testator's assets, on the application of an executor resident in England, but the receiver must give sureties resident in England.

AN executor, who had proved the will in India, having returned to England, proved it in the prerogative court of Canterbury also, and filed a bill in this court for the administration of the assets, and for a receiver. His co-executor, who had resided in India and collected the effects there, being dead, he now moved for the appointment of a receiver in India.

Mr. *Kindersley*, for the motion, said that he believed that the more usual course of the court was, not to appoint a receiver abroad, but to appoint a receiver here, who appointed his own agent abroad; and he mentioned ——— v. *Lindsey*,<sup>(a)</sup> where the Lord Chancellor had so done.

Mr. *Hart*, *amicus curiæ*, stated that the Lord Chancellor had, in several cases, appointed a receiver abroad, he giving security in this country.

The VICE-CHANCELLOR:—Generally speaking, an executor, who has proved the will, cannot retire from his duty, and apply to the court for a receiver; but must collect the estate himself. But in this case, there being assets in India, the executor would be allowed the expense of an agent to collect them; and the appointment, therefore, is no additional charge to the estate:

[\*454] and it is reasonable \*that the executor should be relieved from all responsibility with respect to his agent, by the court taking the nomination upon itself.

1825.—*Dacre v. Gorges.*

Let the master approve of a proper person, to be nominated by the plaintiff, to be receiver of the assets in India; such receiver to give sureties resident in England.

Reg. Lib. A. 1825, fol. 409.

DACRE V. GORGES.

1825, 16th December.—*Partition.—Mistake—Compensation.*

Surveyors appointed to make a partition between tenants in common, having, by mistake, allotted to one of them a piece of land which belonged to him exclusively; and several of the allotments having been sold before the mistake was discovered, the court decreed a pecuniary compensation to be made to him.

THE plaintiff, defendant and three other persons, were entitled, in equal shares, to certain estates as tenants in common in fee.

In 1809, they agreed to effect a partition; and, for that purpose, they appointed surveyors to value the estates and divide them into five distinct allotments. The whole estates were conveyed to a trustee; and, after the allotments were made, they were conveyed, in severalty, to each of the parties.

The surveyors, in making their valuation, erroneously included eleven acres of land in which the plaintiff alone was interested, and these eleven acres were included in the allotment made to the plaintiff; so that, to the extent of their value, the plaintiff had less of the estate to be divided than the four other tenants in common.

This mistake was not discovered till the year 1820; and was then communicated to the other tenants in \*common, some of whom had [\*455] sold considerable parts of their allotments; so that the mistake could not be remedied by a new partition. But all the other tenants in common, having made compensation to the plaintiff according to a new valuation, and the defendant alone refusing to do so, this bill was filed to compel a compensation in money according to the valuation, or to secure to the plaintiff a sufficient rent charge for equality of partition.

The answer denied the mistake, and insisted that the plaintiff had no claim, against the defendant, in respect of the matters mentioned in the bill. The mistake, however, was clearly proved by the evidence in the cause.

Mr. Sugden, and Mr. Teed, for the plaintiff.

Mr. Rolfe, for the defendant:—The plaintiff is to be considered as a purchaser of the allotment awarded by the surveyors; and is as much bound to see that he had a good title to the whole allotment, as a purchaser is bound to see to the title to the whole estate purchased by him. A purchaser has no remedy in case of eviction, unless upon the covenants of the vendor; and, in this case, the plaintiff has no protection of that kind. The plaintiff might have entered.

1825.—*Capel v. Butler.*

Mr. Sugden, in reply:—It is impossible to show any analogy between this case and that of a purchaser. In *Bustard's case*, (a) \*it was resolved that, upon an exchange, if one of the parties was evicted, he should have recompense under the warranty implied by the exchange; and it is added, "the same law in case of partition." And in Co. Litt. 174, a. it is expressly said that, in case of eviction after partition, the party evicted shall have recompense. It was impossible for the plaintiff to enter, because the mode of partition was by conveying the whole of the estate to a trustee, who reconveyed to each party his allotment. This is a case of mistake, committed by joint agents, and therefore is clearly a case for equitable relief.

The VICE-CHANCELLOR:—This is a plain case of mistake on the part of the surveyors, against which it is the office of a court of equity to relieve. The common title under which all parties claim upon a partition, never comes into question: and the case put, of a purchaser with a defective title, has no application here. [1]

"This court doth declare that the plaintiffs are entitled, in right of the plaintiff Meliora Dacre, to a compensation from the defendant, in respect of the one-fifth part of the piece or parcel of land allotted to the plaintiffs, as in the pleadings mentioned; and it is ordered that the defendant do pay to the plaintiff Meliora Dacre, for her own separate use, the sum of 196*l.* 19*s.*, the value of such one-fifth part, with interest of four per cent per annum from the 29th day of September 1820, together with the plaintiffs' costs of this suit."

Reg. Lib. A. 1825, fol. 939.

[\*457]

\*CAPEL v. BUTLER.

1825, 17th December.—*Surety.—Parties.*

If, by the neglect of the creditor, the benefit of some of the securities for the debt is lost, the surety is *pro tanto* discharged.

If a person who is named as a defendant, but has never been served with a subpoena, or appeared to the bill, appears by counsel at the hearing, and consents to be bound by the decree, the defect is cured.

By an indenture, dated the 12th of July 1820, after reciting that one White had agreed with the defendant Butler for the sale to him of an annuity of 150*l.*, for the lives of himself and three other persons, and that, upon the treaty for the grant of the annuity, it was agreed that the same should be secured, not

(a) 4 Co. 121.

[1] Chancery will relieve in cases of mistake in the division of lands, and if the part to be restored has been sold to innocent purchasers, chancery will not decree other lands in exchange, but damages according to the unimproved value of the lands at the time of the decree. *Mitchell v. Owings*, 3 A. K. Marsh (Kentucky,) Rep. 314.

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1825.—Capel v. Butler.

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only by White's covenant and a warrant of attorney to confess a judgment against him for 3,000*l.* and costs of suit, but also by a demise of certain leasehold premises, and by an assignment of two trows or ships belonging to White, and the proceeds and earnings thereof, and of a certain policy of insurance, on the life of White, for 500*l.*, to one Pruett, upon the trusts therein declared; and that it was agreed that the annuity should be further secured by the joint and several bond of White and the plaintiff, in the penalty of 3,000*l.*: and that, in performance of the agreement, White and the plaintiff, by their bond or obligation in writing, bearing even date with the indenture, became jointly and severally bound to Butler, in the penalty of 3,000*l.*, for securing the due payment of the annuity; White covenanted with Butler to pay him the annuity during the lives before mentioned, the first payment to be made on the 12th of October then next; and he demised to Pruett certain hereditaments for the remainder of a term of 1,000 years, except the last ten days; and he also assigned to Pruett all that trow or vessel called "The William of Gloucester," and all that other trow or vessel called "The Endeavor," and all and singular the masts, sails, \*sail-yards, anchors, cables, ropes, yards, guns, [\*458] gunpowder, ammunition, small arms, tackles, apparel, boats, oars, and appurtenances whatsoever to the said ships or vessels belonging, or in anywise appertaining, (which said trows or vessels were in the indenture mentioned to be British built, and respectively registered according to the laws then in force, and the certificates of which registries were set forth in the indenture,) and also the policy of assurance before mentioned, upon trust, if the annuity should be unpaid for twenty-eight days after any of the days of payment, to sell all or any of the trust premises vested in him, and to stand possessed of the proceeds upon trust to pay the arrears of the annuity, and to invest the surplus in his name, either in the public funds, or upon government or real securities, and, out of the yearly proceeds thereof, to keep down the annuity, and subject thereto to stand possessed of the capital in trust for White. And it was by the same indenture covenanted and declared that if White should, at any time after the expiration of two years from the date thereof, give to Butler three calendar months notice of his intention to repurchase the annuity, and should pay to Butler all arrears of the annuity to that day, and also 1,500*l.* as the consideration for the repurchase of the annuity, or if, without giving such notice White should, at any time after the expiration of the two years, pay to Butler all arrears of the annuity, and the consideration of 1,500*l.* together with one quarterly payment of the annuity in lieu of such notice, then the annuity should cease, and all the securities for the same become void.

In pursuance of the agreement before mentioned, White and the plaintiff executed a joint and several \*bond to Butler, dated the 12th [\*459] of July 1820, in the penalty of 3,000*l.* in which were recited the agreement for the sale of the annuity, the indenture of the 12th of July 1820, and the other securities.

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1825.—*Capel v. Butler.*


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The formalities required by the ship register acts were not complied with upon the assignment of the vessels; and, in November 1820, White, taking advantage of that omission, sold them, and applied the proceeds to his own use.

On the 9th of April, 1821, a commission of bankrupt issued against White, under which he was found a bankrupt; and the plaintiff and one Payne were chosen his assignees.

The annuity being in arrear, Butler brought an action against the plaintiff on the bond.

The bill, after stating these facts, alleged that the plaintiff had discovered, since White's bankruptcy, that Butler and Pruett had neglected to perfect the assignment of the trows or vessels according to the forms, and in the mode required by the several acts of parliament for the registry of ships or vessels, and the transfer of property therein; and that White had disposed of the trows or vessels and applied the proceeds to his own use, whereby the security for the regular payment of the annuity had been very much diminished: that the rents of the leasehold premises were not sufficient to answer the growing payments of the annuity, whereas the earnings of the vessels, together with the rents, were, when the plaintiff entered into the bond, and would still be, if the vessels had not been sold, sufficient for that purpose.

[\*460] \*The bill prayed for an injunction to restrain the action; that the bond might be declared void in respect of the defendants not having rendered the assignment of the trows an effective assignment: and that the plaintiff might be decreed to be entitled to re-purchase the annuity on payment of the 1,500*l.*, and 35*l.* (being one quarter of a year of the said annuity) less the value of the trows or vessels.

Butler and Pruett admitted, in their answer, that they did not cause any endorsement or memorandum of the assignment of the trows or vessels to be entered on the register of the trows or vessels, by reason of the counsel, who prepared the securities for the annuity, having advised them that no such memorandum or endorsement was necessary, and that the trows were not within the registry act, because (amongst other reasons) they were not employed, as he considered, for any purpose beyond inland navigation on a river, the trows only trading between Bristol and Gloucester, on the rivers Severn and Avon; and they submitted that the plaintiff had notice of the nature of the assignment or conveyance which White had executed to them of the trows or vessels, and that the same were only secured or assigned to them by the indenture of July 1820, and not by a bargain and sale and endorsement on the registry of the trows or vessels, inasmuch as the bond executed by the plaintiff referred to, and in part recited the indenture of assignment of July 1820.

Mr. *Fonblanque*, and Mr. *Romilly*, for the plaintiff:—White, having fraudulently assigned these vessels, the question is, whether the loss is to [\*461] fall on the plaintiff, \*or upon the party who, if he had used due diligence, might have prevented the loss.

A creditor is a trustee, for the surety, of the securities which he holds for

1825.—*Capel v. Butler.*

his debt. It appears, by the recitals of the bond, that the plaintiff became surety on the faith of the vessels being effectually assigned as a security for the annuity. *Law v. East India Company*, (a) *Mayhew v. Crickett*, (b)

Mr. Sugden, and Mr. Lynch, for the defendants, Butler and Pruett:—Securities have failed before, but such an equity as the present one has never been claimed till now. There is no such rule as that the grantee of an annuity is bound to see that all the securities for it are valid. The circumstance of there being a surety, relieves the grantee from the necessity of ascertaining whether the securities are good or not. The contract is between the grantee and the parties who are to give him the securities. The latter are all grantors; the former, the grantee. Suppose the title to the leaseholds were bad, and the equity contended for by the plaintiff were to prevail, the very instant that the necessity for a surety arose, he would say he was discharged. If he had intended to rely on the securities, he was bound to see that they were valid. A surety is entitled to stand in the place of the creditor; but here he asks to be placed in a better situation. How can it be said that the defendants did not use due diligence, when it appears that they took the opinion of counsel, who advised them that the assignment was valid? It has often been decided that, \*where a solicitor acts under the advice of counsel, he is discharged [\*462] from all responsibility. This has often been held when actions have been brought against solicitors for the defects in the memorials of annuities. Under these circumstances it is impossible to say the loss is to fall upon the defendants.

The Vice-Chancellor was of opinion that the plaintiff, as surety, was entitled to take advantage of the proviso for redemption; and that, the value of the two vessels being lost to him, by the neglect of the defendant Butler, he was entitled to deduct that value from the stipulated price of redemption.[1]

Upon the bankruptcy of White, the plaintiff and one Payne were chosen his assignees: and it was objected that Payne ought to have been a party. Payne was named as a party defendant in the bill; but no subpoena had been served upon him, nor had he appeared to the bill; but Mr. Simons appeared for him at the hearing, and consented to be bound by the decree.

The Vice-Chancellor was of opinion that the objection was cured by Payne appearing by his counsel, and consenting to be bound by the decree. And his honor directed that the defendant Butler should be at liberty to prove, under the commission, for the value of the two vessels; and that the plaintiff Capel should be at liberty to prove under the commission such sum as he should pay

(a) 4 Ves. 824.

(b) 2 Swan. 165.

[1] If a creditor without the consent of the surety relinquishes a subsidiary security, which he holds against the principal debtor or his estate, he discharges the liability of the surety *pro tanto*; but the creditor must have notice of the suretyship; and a wife who has bound her individual property for her husband's debt, is regarded with the same favor as any other surety. *Neimceswick v. Gahn*: 3 Paige, 614; *Chasebrough v. Millard*, 1 Johns. Ch. Rep. 409. 1 Story Eq. 323.

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 1825.—*In re Cole.*


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to the defendant Butler under the decree, and also what he had before paid for arrears of the annuity.

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[\*463]

\**In re Cole.*

1825, 23d December.—*Solicitor and client.*—*Costs of taxation.*

If a bill of costs is taxed after the solicitor's death, his representative will not be ordered to pay the costs of taxation although more than a sixth is deducted.

In this case, a bill of costs had been delivered by an attorney to his client. The attorney died ; and, afterwards, the bill was taxed against his executrix, and more than one sixth was deducted.

The court was now moved that the executrix pay the costs of the taxation.

Mr. *Wakefield*, for the executrix, referred to the case of *Weston v. Pool.*(a)

The Vice-Chancellor was of opinion that the statute did not apply to the personal representative, and that the executrix, being in no default, ought not to pay costs.[1]

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[\*464]

\**REEVE v. DALBY.*

1826, 18th January.—*Pleading.*

A suit, by husband and wife, against the trustees of the latter's separate property, cannot be pleaded in bar to a subsequent suit by her and her next friend against her trustees and husband, although the relief prayed in both suits is the same.

In September 1823, George William Reeve, and his wife, filed a bill against, Thomas Dalby and Thomas Dunston, who were trustees of certain property to which the wife was entitled for her separate use, praying for an account of the trust property ; and that it might be declared that certain deeds of appointment, executed by the wife, had been improperly obtained from her by the trustees ; and that those deeds might be delivered up to be cancelled.

In June 1825, Sarah Reeve, the wife, by her next friend, filed a bill against the trustees, her husband, and one Thomas Street, praying the same relief as was sought by the former suit, but charging her husband and Street to be parties to the fraud by which the deeds of appointment had been obtained from her.

To this last bill the trustees pleaded another suit depending in this court for the same cause.

Mr. *Horn*, and Mr. *Whitmarsh*, in support of the plea :—The husband

(a) 2 Stra. 1056.

[1] Vide *Maddesford v. Annetwick*, 3 Myl. & Cr. 423.

1826.—*Bristow v. Boothby.*

and wife are not separated, but are living together; and both the suits are conducted by the same solicitor. No relief is prayed against the husband; and it would be impossible to make out any case against him. There is no difference in the relief \*sought by the suits; and therefore, they [\*465] are, in fact, for the same cause.

Mr. *Sugden*, and Mr. *Norton*, for the bill:—The plea of another suit depending cannot be supported, unless both suits are not only for the same cause, but between the same parties.

The Vice-Chancellor overruled this plea, stating that the first suit was to be considered as the suit of the husband alone; [1] and that a decree of dismissal in that suit would be no bar to the wife. [2]

BRISTOW v. BOOTHBY.

1826, 26th January.—*Construction.—Remoteness.—Power.*

Settlement on husband and wife for their lives, remainder to the sons in tail male, remainder to the daughters in tail, remainder to the survivor of the husband and wife in fee, with power to the wife, if the husband survived, and all the children of the marriage died without issue, to charge the estate with 5,000*l.*; held that the power is void for remoteness.

By Sir Brooke and Lady Boothby's marriage settlement, certain freehold estates, the property of the lady, were settled on Sir Brooke Boothby for life, with remainder to Lady Boothby for life, with remainder to trustees for 500 years, for raising portions for the younger children of the marriage, with remainder to the first and other sons of the marriage in tail male, with remainder to certain other trustees, for a term of 1,000 years, to raise portions for the daughters in default of issue male of the marriage, with remainder to the first and other sons of Lady Boothby, by any after-taken husband, in tail male, with remainder to the daughters of Lady Boothby, equally, as tenants in common in tail, with remainder to the survivor of Sir Brooke and Lady Boothby in fee: and it was provided that, in case there should not be any child or children of the marriage, or, there being such, all of them \*should die without issue, and Sir Brooke should survive Lady Booth- [\*466] by, then it should be lawful for Lady Boothby, by deed or will, whether she should be covert or sole, and notwithstanding her coverture, to charge the premises with 5,000*l.*, to be raised and paid, after the decease of Sir Brooke and Lady Boothby, and such failure of issue as aforesaid, to such person as Lady Boothby should direct, and to create a term of years for the better raising of such sum of money.

There was only one child of the marriage, who died at the age of eight years.

[1] *Vide Wake v. Parker*, 2 Keen, 71.

[2] *Vide Hughes v. Evans*, 1 Sim. & Stu. 185-188, and note *ibid.*



1826.—*Bristow v. Boothby.*

Lady Boothby died in the lifetime of Sir Brooke, having, by her will, executed the power of charging the settled estates with the 5,000*l.*

The present suit was instituted by a person claiming under that will, against the heir of Sir Brooke Boothby, for the purpose of giving effect to that charge. The defendant put in a general demurrer.

Mr. *Tinney*, and Mr. *Coote*, in support of the demurrer:—Any estate or charge limited after an indefinite failure of issue, not inheritable under the limitations, is void for remoteness. *Lady Lanesborough v. Fox.*(a) *Jones v. Morgan.*(b) Therefore this power is void, as being limited after a general failure of issue, there being no limitation to the daughters or sons.

[\*467] \*It may be said that, in this case, the word “issue” means “such issue,” or “issue inheritable,” but it is not so expressed, nor can it be collected from the deed. In fact, it is impossible to ascertain whether the parties intended that the limitation should include all the issue, or whether the power should be confined to the issue inheritable.

It may be also argued that there could be no issue born whose ancestor might not have suffered a common recovery and barred the power. But there might have been a son who might have died under twenty-one, leaving a daughter; in which case the power could not have been barred, nor would it be exercisable until a general failure of issue. It may be also said the power is good in the event. But if a power or estate is void for remoteness, it cannot be made good in the event. *Proctor v. The Bishop of Bath and Wells.*(c)

Mr. *Sugden*, in support of the bill:—In construing this settlement, the intention of the parties must be regarded. Their object was to give Lady Boothby a power of charging the estate in the event of Sir Brooke surviving her, and there being a failure of issue of the marriage. It is impossible to put a literal construction upon the words of the proviso; for the power is to be exercised by her whether she should be coverte or sole. Now she must necessarily be under coverture when she exercised the power, as it is given to her only in the event of her husband's surviving her.

[\*468] \*The case of *Lady Lanesborough v. Fox* does not resemble this. For there the devise was held to be void; on the ground that it could not be the intention of the testator to exclude a line of issue, namely, the daughters or sons, who were wholly unprovided for. Here all the children are provided for by the settlement. The eldest son takes the estate, and the younger sons and daughters have charges upon it. Besides, *Lady Lanesborough v. Fox* has been overruled by the decision of the house of lords in *Lord Newburgh v. Lady Newburgh.*(d) That case underwent great consideration both in and out of court: and the house of lords has decided that Lady Newburgh took, by implication, a life estate in the Gloucestershire property, and that all the other estates necessary to fill up the chasm must be also implied. It ap-

(a) Ca. Temp. Talb. 262; and Fearn's Cont. Rem. 8th edit. 447.

(b) Ibid. 451, and Appendix, No. III.; S. C. 1 Bro. C. C. 206. (c) 2 H. Black. 358.

(d) Not yet reported. The case is reported upon other points in 5 Madd. 364.

1826.—*Bristow v. Boothby.*

pears from the cases of *Jones v. Morgan*,<sup>(e)</sup> *French v. Cadells*,<sup>(f)</sup> *Wellington v. Wellington*,<sup>(g)</sup> and *Lytton v. Lytton*,<sup>(h)</sup> that the courts will, if possible, confine the expression "failure of issue," to issue living at the testator's decease. These cases are conclusive as to wills.

This case is not open to any difficulty. For, suppose there had been daughters of sons, they would have taken nothing under the settlement; Sir Brooke would have taken the reversion, and might have disposed of it as he pleased. There is no danger, therefore, if effect is given to the proviso, of excluding any person whom the settlors meant to include.

"Now the question is, how this case varies from those we have [\*469] cited; we are not seeking to alter technical words of limitation. The word "issue," here, is not used in a technical sense; not to create a limitation, but only to specify the event in which the power is to arise: any language may be used for that purpose. There is no rule that is applicable to the construction of a will, which may not be applied in construing a clause which is to give effect to a proviso. The intention of the parties must guide in both cases. If then it can be inferred that the parties to this settlement regarded sons of the marriage only, what is there to prevent the court from holding that the settlors by the word "issue" meant issue inheritable under the settlement? That word admits of modification, and the court has power to modify it.

Mr. *Sclater*, with Mr. *Sugden*, relied on *Morse v. Lord Ormonde*.<sup>(i)</sup>

The VICE-CHANCELLOR:—In that part of the instrument which creates the power, the clear expressed intention is, that it shall only take effect upon a general failure of issue of the marriage; and there is no language, in any other part of the instrument, which can authorize a court to state that this was not the real intention of the parties. There can be no doubt that, if it had been pointed out to the parties that the estate was not limited to all the issue of the marriage, and that the power expressed was, therefore, too remote, the deed would have been altered, \*and that the power and the limita- [\*470] tions to the issue would have been made to correspond. But there is nothing in this instrument which enables me to say whether this would have been effected by extending the limitation to the sons in tail general, or by directing that the power should arise upon the failure of the particular issue of the marriage, who were inheritable under the settlement, as it is now framed. I am compelled, therefore, to construe the deed as I find it, and to say that the event upon which the power is to arise, being too remote, the demurrer must be allowed.[1]

(e) *Ubi Sup.*

(f) 3 Bro. P. C. 257.

(g) 4 Burr. 2165; S. C. 1 W. Black. 625.

(h) 4 Bro. C. C. 441.

(i) 5 Madd. 99. [Vide Memoranda, post, 479.]

[1] This case was affirmed by Lord Lyndhurst on appeal, June 30, 1829, as we are informed by Lord Cottenham in *Ellicombe v. Gompertz*, 3 Myl. & Cr. 127, where it was held upon the whole context of the will, that the words "after the decease of all the sons and grand-sons" must be read as if they had been "after the decease of all the *aforesaid*," or "all *such* sons and grand-sons," by

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 1826.—In re Lord Somerville.
 

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## In re LORD SOMERVILLE.

 1826, 24th and 31st January.—*Tenant in tail*.—Stat. 39th and 40th Geo. 3, c. 56.

Although a fund, of which a person is tenant in tail, is subject to certain charges, the court will, under the 39th and 40th Geo. 3, c. 56, order it to be transferred to the tenant in tail, after providing for the charges.

THE late John Lord Somerville, by his will, charged his real estates with the payment of his debts and legacies, in aid of his personal estate; and authorized his trustees to sell the same for that purpose; and directed that, in case there should be any surplus arising from his personal estate, or the produce of his real estate, it should be laid out in land, to be settled, in default of issue of his own body, to the use of his eldest half-brother Mark, now Lord Somerville, and the heirs of his body, with divers remainders over.

The trustees sold certain parts of the real estate, and, with the produce thereof and of the personal estate, paid all the testator's debts and legacies except a legacy of 1,000*l.* (which was not payable until the legatee attained the age of thirty years,) and four life annuities of 35*l.*, 50*l.*, 33*l.* and 33*l.*; [\*471] and, subject to that legacy and the annuities, they invested the surplus in the purchase of 22,733*l.*, three per cents.

In July last, Lord Somerville presented a petition to the court, under the 39th and 40th Geo. 3, c. 56, praying that the trustees might be declared to hold the stock in trust for him, for his own use, discharged from the entail and all subsequent limitations created by his brother's will, but subject to the legacy and annuities, and might be directed to pay to him what should remain thereof, after satisfying or providing for the legacy and annuities. Upon this petition, the usual order of reference was made to the master. The master re-

which construction the limitation was prevented from being too remote. His lordship there observes, "But suppose the case had stood simply thus: provision is made for certain members of a class answering a particular description, and then a gift over is made upon the failure of the class. If it be clear that the whole of the class were not to take, the gift over, though made to depend upon the failure of the whole class, will be construed to take place upon the failure of that description of the class, who were to take; and on the other hand, if it appears that all the class were intended to take, although some only are enumerated, and the gift over be upon the failure of the whole class, the court will adopt such a construction as will extend the benefit, in the best way the law will admit, to the whole class. Of both these propositions the authorities present many examples. In *Trickey v. Trickey*, (3 Myl. & K. 560,) the testator had provided for the children of his daughter at twenty-one, with a provision that the children of any child of his daughter dying in the mother's lifetime should stand in the place of the parent; and then made a gift over, upon the death of all children of his daughter under twenty-one, or not leaving issue who should attain that age. This limitation over was held not too remote, the generality of the expression being confined by the prior provisions." Then speaking of the case in the text, the Chancellor observes that there "the decision was the other way, upon the circumstances of the case; but the principle is recognized, Lord Lyndhurst in his judgment, observing that the question was, whether the term "issue" was to be taken generally, or to be restricted so as to denote issue before mentioned, and concluding by saying that it did not appear to him that there were any circumstances to lead to the conclusion that the term ought to be taken in the restricted sense with respect to the previous limitation."

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 1826.—*Jackson and wife v. Rowe.*


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ported that he was of opinion that the petitioner was not entitled to the stock, subject to the legacy and annuities, under the 39th and 40th Geo. 3, c. 56; and that he did not find that there were any charges or incumbrances affecting it, except the legacy and annuities.

The petitioner then presented another petition, praying for the same relief, upon the facts stated in the master's report, as was prayed by the former petition.

*Mr. Pepys*, for the petitioner:—It is quite clear that Lord Somerville is tenant in tail of this fund. The only difficulty the master had was, whether the court could deal with it so long as the legacy and annuities were unpaid. If, however, the fund had been laid out in land, the charges upon it would not have prevented Lord Somerville from barring the entail.

\**Mr. Walker* appeared for another half-brother of the testator, who [\*472] was the first remainder-man.

The Vice-Chancellor made a declaration and order according to the prayer of the petition.(a)

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#### JACKSON and WIFE v. ROWE.

1826, 1st February.—*Pleading.*—*Purchaser for valuable consideration without notice.*

A plea of purchase of valuable consideration, without notice, is no protection against an adverse claim which the purchaser might have had notice of, by using due diligence in investigating the title.

THE bill stated indentures of lease and release, dated in September 1789, by which the late father and mother of the plaintiff, *Mrs. Jackson*, limited an estate to the use of the father for life, remainder to the mother for life, remainder to one or more of their children as they, jointly, or as the survivor of them, should appoint: that by an indenture, dated in July 1799, reciting the indentures of September 1789, and that the father was dead without having joined with the mother in exercising the power, the mother, in exercise of the power given to her by the indenture of release, appointed the estate to the use of the plaintiff, *Mrs. Jackson*, in fee: that, at the time of the execution of the appointment, *Mrs. Jackson* lived with her mother, and continued so to do until the year 1801, when her mother intermarried with the late father of the defendant: that, during all such residence, her mother kept in her possession the title deeds of the estate, and received the rents of it on her, the plaintiff's, account, and, from time to time, duly accounted with her for the same: that the defendant's father, upon his marriage with *Mrs. Jackson's* mother,

\*took possession of the title deeds, and received, and applied to his own [473]

(a) See the 7th Geo. IV. c. 45, which repeals, but afterwards re-acts the provisions of the 39th and 40th Geo. III. c. 56, and also expressly provides for cases in which the trust moneys are subject to charges antecedent to the estates tail.

1826.—Jackson and wife v. Rowe.

use, the rents of the estate; that he died in October 1816, leaving his wife him surviving, and the defendant his executor and heir-at-law; that the plaintiff's mother died in March 1824, having appointed the plaintiff sole executrix of her will: that the defendant, either as heir or devisee of his father, had taken possession of the title deeds, and entered upon the estate, and received the rents of it, from the death of his father, and still was in the receipt thereof. The bill prayed that the defendant might account for, and pay to the plaintiff the amount of the rents received both by his father and himself; and might deliver up to the plaintiffs the title deeds; and be restrained from further receiving the rents.

The defendant demurred, for want of equity, to so much of the bill as sought either relief or discovery with respect to the rents received, either by himself or his father, in the lifetime of Mrs. Jackson's mother. And, as to the relief and discovery founded upon Mrs. Jackson's title to the estate under the indentures of 1789, and the subsequent deed of appointment, the defendant pleaded that he had been informed and believed that Mrs. Jackson's mother, before her second marriage, and the execution of the indentures after mentioned, pretended that she was seised in fee, in possession, of the estate, and was in quiet possession or receipt of the rents and profits thereof: that, in November 1801, a marriage was agreed upon between Mrs. Jackson's mother and the defendant's late father; and that, in consideration thereof, the

former agreed to convey to the latter the fee-simple of the estates, in [\*474] possession, in manner after mentioned: that, by indentures of lease and release dated the 18th and 19th of November 1801, after reciting that Mrs. Jackson's mother was seised in fee of the estate, the intended marriage, and the agreement previous thereto, the mother conveyed the estate to the defendant's father and his trustee, in the usual manner to bar dower. The plea then denied notice, in the defendant's father, of any right or title of the plaintiff Mrs. Jackson to the estate, or of the indentures of 1789, and stated the defendant's title to the estate under his father's will, and insisted that the father was a *bona fide* purchaser of the estate, for valuable consideration, without notice.

The plea was supported by an answer to the same effect as the averments denying notice.

Mr. Hart, and Mr. Walker, in support of the demurrer, argued that, by the true effect of the indenture of appointment, as stated in the bill, the plaintiff, Mrs. Jackson, took no interest in the rents and profits during the life of her mother, and, consequently, could not be entitled to any account of such rents and profits during that period.

The Vice-Chancellor was of that opinion.

In support of the plea, they insisted that marriage, being a valuable consideration, the plea was a sufficient plea of purchase for a valuable consideration without notice; and they cited *Walshyn v. Lee*. (a)

(a) 9 Ves. 24.

1826.—*Creswell v. Harris.*

Mr. *Heald*, and Mr. *Tennant*, in support of the bill.

\*The VICE-CHANCELLOR :—I agree that the consideration of marriage will support a plea of purchase for valuable consideration, equally with a price paid in money. But the question here is, whether the defendant's father was not, at the time of the marriage, affected with implied notice of the settlement of 1789. It must be intended, upon these pleadings, that the title of the plaintiff's mother to the estate in question depended wholly upon this settlement; and the defendant's father, like every other purchaser, was bound to use due diligence in the investigation of the title before he accepted the conveyance of the estate. With due diligence he must have discovered the root of the title; and that his intended wife had only a life estate; and although he may, in fact, have been ignorant of the settlement, according to the averment of the plea, yet, in equity, he must be fixed with all the knowledge which it was reasonable he should acquire:[1] and the plea is therefore disproved by the implied notice. If it were otherwise, a mere disseisor would have a marketable title.

If the plea, instead of resting upon the mere assertion of the intended wife that she had a good title, had pleaded some instrument, anterior to the settlement of 1789, by which the fee-simple had vested in her, and had averred that the defendant's father relied upon such prior title, and had no notice of the settlement, then the defence would have prevailed, because reasonable diligence on the part of the defendant's father could not necessarily have led to the discovery of the suppressed settlement.

The plea must be overruled.[2]

\*CRESWELL V. HARRIS.

[\*476]

1826, 20th January.—*Order.—Construction.—Month.*

Where an order allowed the plaintiff a month's time to amend his bill: held that a lunar month was meant.

By an order in this cause, a month's time was given to the plaintiff to amend his bill.

The order was made on the 24th of July, but the bill was not amended until the 25th of the next month; and the question was, whether the amendment had been made within the time allowed.

Mr. *Hart*, and Mr. *Tinney*, for the plaintiff, contended that the day on which

[1] Vide *Green v. Slater*, 4 Johns. Ch. Rep. 46. *Hawley v. Cramer*, 4 Cow. 717. *Peters v. Goodrich*, 3 Conn. Rep. 146.

[2] The plea must not only aver that the defendant had no notice of the plaintiff's rights before his purchase, but that he had actually paid the purchase money before such notice: giving security for payment is not sufficient. *Jewett v. Palmer*, 7 Johns. Ch. Rep. 68. *Hugh v. Batte*, 10 Yerger, (Tennessee.) 385. The *onus probandi* as to notice, lies on the plaintiff. *Carr v. Callaghan*, 4 Little's (Kentucky,) Rep. 365.

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 1826.—Todd v. Dismor.
 

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the order was pronounced was not to be taken into account, in computing the time limited by the order; and they cited *Clayton's case*,<sup>(a)</sup> *Norris v. The Hundred of Gawtry*,<sup>(b)</sup> *Castle v. Burditt*,<sup>(c)</sup> and *King v. Adderley*.<sup>(d)</sup>

Mr. Agar, for the defendant.

The Vice-Chancellor held that the order allowed the plaintiff a lunar month only, and that, therefore, the bill had not been amended within the time prescribed.<sup>(e)</sup>

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 [\*477]

\*TODD v. DISMOR.

1826, 20th January.—*Practice*.—*Injunction*.

The common injunction had issued against all the defendants; one of them filed his answer, and that obtained an order *nisi* to dissolve the injunction, suggesting that all the defendants had answered. The order was discharged for irregularity.

THERE were three defendants in this cause.

An injunction to stay proceedings at law until answer, or further order, had been granted against them, as of course, and in the common form. One of the defendants put in his answer, and then obtained an order *nisi* to dissolve the injunction, suggesting that all the defendants had answered.

The Vice-Chancellor, discharged the order, for irregularity, stating that, although one defendant having answered had a right to move to dissolve the injunction as against himself, it ought not to be suggested, in the order *nisi*, contrary to the fact, that all the defendants had put in their answers.

Mr. Agar, in support of the motion.

Mr. Heald, contra.

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 [\*478]

\*ALLANSON v. MOORSOM.

1826, 24th January.—*Practice*.—*Exceptions*.—*Order of reference*.

It is irregular to obtain one order of reference only, where more than one answer is excepted to.

THE defendant, Moorsom, a bankrupt, and the other defendants, his assignees, put in separate answers. The plaintiff filed distinct exceptions to the answers, but obtained one order only for referring them to the master. The master made but one certificate, reporting both answers insufficient. The bankrupt and his assignees filed two sets of exceptions to the certificate, and paid two deposits of 5*l.* each, on setting them down.

Mr. Koe, for the defendants, now moved that they might be at liberty to

(a) 5 Rep. 1.

(b) Hob. 139; S. C. 1 Brownl. 156.

(c) 3 T. R. 623.

(d) Doug. 446; and see Bayley on Bills of Exch. 4 ed. 202.

(e) See *Talbot v. Linfield*, 1 W. Black. 450.

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1826.—Memoranda.

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withdraw their exceptions, and put in better answers; and that the registrar might be ordered to return to the defendants one of the deposits, and that the other might be paid over to the plaintiff. He contended that, as one report only was excepted to, one deposit only of 5*l.* would be called for on setting down the exceptions.

Mr. *Parker*, for the plaintiff.

The Vice-Chancellor held that two orders of reference to the master ought to have been obtained, and granted the motion, except that he ordered both the deposits to be paid to the plaintiff.

Reg. Lib. A. 1825, fol. 379.

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\*MEMORANDA.

[\*479]

THE case of *Morse v. Lord Ormonde*, which is cited ante, p. 499, and reported in 5 Madd. 99, was affirmed, on appeal, by the Lord Chancellor, on the 29th of April 1826.

The Lord Chancellor's judgment in the *The Earl of Westmeath v. The Countess of Westmeath*, lately reported by Mr. Jacob, p. 126, contains some observations relative to the question discussed in *Elworthy v. Bird*, ante, p. 372.

END OF PART III.



## CASES IN CHANCERY

BEFORE

### THE VICE-CHANCELLOR.

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[\*481]

\*GOODENOUGH v. ALWAY.

1826, 24th January and 25th February.—*Practice.—Depositions.*

The court will not on motion order depositions, in a tithe cause in the exchequer, to be read in a tithe suit in this court, against other occupiers of land in the same parish though the objects of both suits, and the interest of the parties, were the same.

THIS was a tithe suit by a rector against the occupiers of land within his parish. The defendants set up a modus. In a suit of the same nature in the court of exchequer, between a former rector of the parish and other occupiers, the latter had proved the modus in question.

The defendants now moved that they might be at liberty to read, at the hearing of this cause, the depositions in the suit in the exchequer.

Mr. Koe, for the motion :—The court makes such an order where the cause in which the depositions were taken is in the same court as that in [\*482] which they are sought to be read. *Cooke v. \*Fountain.*(a) The depositions may be read without any order for that purpose, if the whole proceedings in the cause in which they were taken are put in evidence ; and the object of the order is, to save the useless expense of proving all the proceedings.

In *Palmer v. Lord Aylesbury*,(b) where the depositions in the cause were ordered to be read on the trial of an issue, the Lord Chancellor said that, without such an order, the whole record must be read ; and, to save that expense, the court ordered the depositions to be read as evidence.

Mr. Treslove, for the plaintiff, opposed the motion.

The VICE-CHANCELLOR :—The parties not being the same, the court cannot make such order. If the depositions sought to be read are, under the circumstances, legal evidence for the defendant, they must be proved in due form and the court cannot, *per saltum*, dispense with the legal proof.(c)

Motion refused.

(a) 1 Vern. 413.

(b) 15 Ves. 176.

(c) In the *Mayor of London v. Perkins*, 3 Bro. P. C. 602, where a bill was filed, in the court of

1826.—*Mendizabel v. Machado.*

## \*MENDIZABEL v. MACHADO.

[\*483]

1826, 3d and 13th February.—*Practice.*—*Commission to examine witnesses abroad.*

A motion for a commission to examine a witness abroad, in aid of an action at law, must be supported by an affidavit, stating the name of the witness, and the points to which he is to be examined.

The danger that naming a witness abroad, in an affidavit for a commission, may expose a witness to be tampered with, is not a sufficient reason for not naming him in the affidavit, and specifying the points as to which he is to be examined.

THE bill was filed for a commission to examine witnesses abroad, and for a discovery, in aid of an action at law commenced by the plaintiff in this suit. The defendant having taken an order for time to answer the bill, a motion was now made on behalf of the plaintiff, for a commission to examine a witness in the Brazils; but the notice of motion did not specify the name of the witness, or the facts to which he was to be examined.

Mr. Sugden, and Mr. T. O. Anderdon, for the motion.

Mr. Heald, and Mr. Russell, contra.

The facts of the case, and the authorities cited, are mentioned in the judgment.

THE VICE-CHANCELLOR :—In this case an application was made, on the part of the plaintiff, for a commission to examine a witness in the Brazils; and, of consequence, to stay the proceedings at law until the return of such commission. The affidavit in support of the motion, without naming the witness, states only that evidence material to the issue in the cause can be given by a witness who is believed to be in the Brazils.

Upon the discussion of the motion, it occurred to me to question the sufficiency of the affidavit: for if it were enough that the party should swear to the materiality of the evidence, without either naming the [\*484] witness, or the points to which it was proposed to examine him, it seemed to afford to a party the opportunity of postponing any proceedings at law, in which he was concerned, to an indefinite period of time, at his pleasure; and this with little danger of the penalties of perjury; because the materiality of evidence is not a mere fact, but involves the very nicest question of law upon which there may well be an honest difference of opinion between persons of knowledge and experience.

In support of the application, I was referred to the case of *Oldham v. Carleton*,<sup>(a)</sup> in which it was said the practice was settled; and to a subsequent

exchequer, by the corporation of London, to recover a tonnage duty, it was moved that the depositions of witnesses in two former causes, by the corporation against other defendants, for recovering the same duty, might be read at the hearing, the witnesses being dead. The court of exchequer refused the motion. But, on appeal to the house of lords, it was declared, "that the court of exchequer ought not to have refused to grant an order for the appellants to have liberty to read the dispositions taken in the two former causes at the hearing of this cause, saving all just exceptions." [Vide *Williams v. Brodhead*, 1 Sim. 151. *Carrington v. Cormock*, 2 Sim. 567.]

(a) 4 Bro. C. C. 88.

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case in Vesey, in which *Oldham v. Carleton* was followed. (b) The case of *Oldham v. Carleton* was the mere expression of the opinion of the register.

Considering the question of great importance, I adjourned the case for further consideration. The officers of the court have not been able to furnish me with any authorities which are not in print. There are, however, two authorities directly opposed to the register's opinion in *Oldham v. Carleton*. The first is reported in 1 Vern. 344; and the Lord Chancellor there states that the general affidavit of having material witnesses abroad, beyond the sea, is not sufficient for a commission; but the witnesses must be named, and the points to which they can materially depose. The other authority is *Moody v.*

[\*485] *Steele*. (c) There, the reporter states \*that a commission to India was moved for upon the common affidavit; and Mr. Baron Thomson gives his judgment in these words: "Your bill states the affairs to have taken place in India. Your affidavit must verify that, and show in what manner this testimony is material. We cannot put off a trial for two years, on the common affidavit requiring to delay it for a term. You must come again with a full affidavit."

It is plain that, by the common affidavit, is here meant the affidavit usually made to delay a trial upon the absence of a material witness, which states only that the evidence is material, without specifying the points to which it is intended to examine the witness.

I will now state the case of *Oldham v. Carleton*, which is relied on in opposition to the authorities I have cited. [Here the Vice Chancellor read the whole report of the case.] This case is nothing more than the imperfect recollection of the register as to the practice, in opposition to two cases, not merely deciding a contrary practice, but explaining the principles upon which that practice is founded. The weight of authority, therefore, as well as the weight of principle, is against the present application.

If, generally speaking, it be fit that the court should judge of the materiality of the evidence sought to be obtained by the commission, before it consents to delay, perhaps for years, the proceedings at law which are pending against the party, it is more especially necessary in the present case.

The defendant Machado, under a convention concluded, at the restoration, between France and Spain, \*received from the French government, and is now in possession of a sum exceeding 300,000*l.*, as a trustee for such subjects of Spain as could establish claims against the former government of France. In 1823, the actual government of Spain, for the purpose of providing means to repel the invasion of France, caused certain bills of exchange to be drawn upon the defendant, in order that the trust money in his hands might be applied to public purposes; and, by way of compensation to the claimants who were entitled to this money, they appear to have directed that the defendant's name should be inserted in the great book of the public

(b) *Rougement v. Royal Exchange Assurance Company*, 7 Ves. 304.

(c) 2 Amb. 386.

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 1828.--Mendizabel v. Machado.
 

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debt of Spain, as a creditor for the same sum. The defendant refused to accept these bills; and the plaintiff, being the holder of these bills to an amount of 200,000*l.* or some such large amount, now sues the defendant for that sum in this country. And very singular questions will come to be considered in this action: first, whether, by the constitution of the Spanish government, there resides any where sufficient authority legally to transfer to the state this trust property, so as to relieve the defendant from all claims on the part of those for whom he was constituted a trustee: and if so, whether, secondly, the actual government of Spain in 1823, is in the courts of this country, to be considered as the legitimate government of Spain: which probably would turn upon the question whether that government was, or not, recognized by the public authorities of this country; and thirdly, if by the constitution of the Spanish government, there did reside somewhere sufficient authority legally to transfer to the state this trust property; and if the Spanish government in 1823 be to be considered in the courts of this country as the legitimate government of Spain, then, whether that sufficient authority so to transfer this [\*487] property was or not exercised in due form?

Considering, therefore, the unusual character of the questions which will arise in this case, it is especially necessary for the court to be informed of the nature of the evidence which is expected from the witness in the Brazil, before it consents to delay the trial in this case for years, merely upon the affidavit of the plaintiff, that he believes some person in Brazil can give evidence which he, the plaintiff, considers to be material; a point upon which he can have no sufficient means to form a sound opinion.

There seems latterly to have prevailed a notion that it was not necessary, for a party applying for a commission to examine witnesses abroad, to state the names of his witnesses, upon the ground that it would expose his witnesses to be tampered with. That reason is not without force: but I doubt whether the danger of imposition upon the court, if the party is not compelled to name his witness, is not a greater evil than the supposed inconvenience of the contrary practice. In the case of *Oldham v. Carleton*, it seems to have been conceded, by all parties, that the witness must be named, and the case in the 1st Vernon is to that effect.

I give no opinion upon the point now, because it was not argued; but I wish to apprise the plaintiff that any objection taken on that ground to a future affidavit will be entitled to great consideration; and he will, therefore, judge for himself as to the prudence of introducing the name of his witness in the subsequent affidavit which I now require him to make. [1]

[1] 5. C. 1 Sim. 68.

1826.—Rhodes v. Cook.

[\*488]

\*RHODES v. COOK.

1826, 24th and 27th February.—*Agreement.—Parent and child.*

A tenant for life of real estate, with remainder to his children as he should appoint, remainder to them in fee, entered into an agreement with a creditor to which his children were parties, that the estate should be immediately sold, and one half of the produce paid to the father, and the other to the children. The father remained in possession for seven years, and then died, without having taken any step to carry the agreement into effect. A bill by the personal representative of the creditor against the children and the representative of the father, to have the agreement carried into effect, was dismissed on the ground that the father, by continuing in possession of the estate, deprived his daughters of the benefit of the agreement.

IN 1812 the defendant to the original bill, being tenant for life of an estate, with remainder to his children as he should appoint, with remainder to his children in fee, mortgaged the estate, and assigned a policy of insurance on his life to the plaintiff's testator, to secure a sum of money advanced to him by the latter. In November 1814 the defendant obtained a further advance of 500*l.* from the same person, for which he gave his bond only; but an agreement was at the time made between him, of the first part, his two daughters, who were his only children, of the second part, and the creditor, of the third part; whereby it was agreed that the mortgaged estate should be immediately sold, that the father should receive for his own use a clear moiety of the produce, and that the other moiety should be equally divided between the two daughters. The father lived seven years after the agreement was entered into, and continued during the whole time in possession of the estate, without taking any steps to carry the agreement into effect. After the filing of the original bill the father died.

This was a supplemental bill by the creditor's executor against the daughters and their father's executor, praying that the agreement might be [\*489] carried into effect, that the estate might be sold, and that a clear moiety of the produce, after satisfaction of the mortgage debt, might be deemed assets of the father, and applied in a course of administration in payment of the bond debt of the plaintiff's testator, and of the other creditors of the father.

One of the daughters stated, in her answer, that she had been induced to join in the agreement because her father had a power of appointment over the estate to such one or more of his children as he should think fit, and had threatened her to appoint the whole estate to her sister, if she would not join in the mortgage. But these statements were not supported by evidence; nor was there any that the mortgagee was a party to any undue influence on the part of the father.

The Vice-Chancellor dismissed the supplemental bill, with costs, upon the ground that the father, by continuing in possession of the estate, had deprived his daughters of the benefit which they were to receive from the agreement; and, on the original bill, made the common decree for a mortgagee upon a bill of foreclosure, there being no evidence to affect the mortgages as party or

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privity to any undue influence used by the father with his daughters. And his honor stated that such undue influence was not to be inferred; and that the assistance, thus afforded by the daughters to the father, might either be the effect of pure affection, or, under some circumstances, might even be dictated by wordly prudence.

Mr. *Horne*, and Mr. *Wray*, for the plaintiff.

Mr. *Sudgen*, and Mr. *Hinds*, for the defendant.

\*KNIGHT v. KNIGHT.

[\*400]

1826, 1st and 2d March.—*Legacy.—Vesting.*

Legacy to A. as soon as she attains twenty-one, with interest, is contingent, and no interest is payable until the legatee attains twenty-one, and then is to be computed from the end of a year after the testator's death.

EDWARD KNIGHT, by his will, dated the 26th of July 1803, gave to trustees 50,000*l.* three per cent. consols, in trust to pay certain annuities to his nephews, the defendant John Knight, and the plaintiff Thomas Knight, and some other persons, and then expressed himself as follows:—"I likewise give and devise to each of the daughters of Thomas Knight lawfully begotten, as soon as they attain the age of twenty-one years, the sum of 2,000*l.*, with interest at the rate of five per cent. per annum, and to each of the sons of the said Thomas Knight lawfully begotten, as soon as he attains the age of twenty-one years, the sum of 3,000*l.*, with interest at the rate of five per cent. per annum;" and he appointed John Knight his sole executor and residuary legatee.

The testator died on the 30th of May 1812.

Thomas Knight had several children living at the testator's death, and one named Charles, born afterwards, who were all still living, except a daughter named Isabella, who died under age. Her father was her personal representative. Some of the children were adult, others were still infants.

The bill was filed by Thomas Knight, and such of his surviving children as were born before the testator's death, against John Knight, the executor, and Charles \*Knight, the child born after the testator's death. It [\*491] charged that the legacies were to be considered as interests vested, immediately upon the decease of the testator, in the children born in the life time of the testator, and living at his decease; and that Isabella Knight's legacy was not to be considered as lapsed, but on the contrary, ought to be paid to the plaintiff Thomas Knight, as her personal representative; and that he, as such personal representative, and all the other plaintiffs, were entitled to interest after the rate directed by the will, on their respective legacies, from the death of the testator to the respective times of the payment thereof; and that Charles Knight, although born after the decease of the testator, claimed to be entitled to a legacy of 3,000*l.* with interest. It prayed that interest might be

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computed on the legacies of all the children who were living at the testator's death; that John Knight might be directed to pay to Thomas Knight, as the personal representative of his daughter Isabella, the legacy of 2,000*l.*, and whatever should be found due in respect of interest thereof, and to pay to such of the other plaintiffs as were adult, their legacies and interest; and that the legacies of all the other plaintiffs, together with whatever should be found due for interest upon the same as aforesaid, might be paid into court and secured for their benefit, and that a proper allowance might be made for their maintenance.

J. Knight, by his answer, said that, even supposing all the children who were born in the testator's lifetime to be entitled to legacies on their attaining the age of twenty-one years, yet they were not entitled to them unless they should live to attain that age; and he submitted whether the legacies [\*492] were or were not to be considered as interests vested, immediately upon the decease of the testator, in the children born in the lifetime of the testator, and living at his decease; and whether any interest was payable in respect of those legacies until the respective legatees attained their ages of twenty-one years; and he insisted that the legacy of Isabella Knight was to be considered as lapsed, and ought not to be paid to Thomas Knight as her personal representative.

Mr. Sugden, and Mr. Lynch, for the plaintiffs:—As the legacies to the children living at the testator's decease were to carry interest, they vested in them immediately. *Hanson v. Graham.*(a) They were portions vested payable at twenty-one, with the interest payable in the mean time. *Leake v Robinson,*(b) in which all the cases as to the vesting of legacies are collected.

Mr. Hart, and Mr. Pemberton, for the defendant John Knight:—*Hanson v. Graham* does not govern this case, for it is clear that the legatees in that case took vested interests in the dividends of the stock, whatever they might do in the capital. Wherever there is an absolute gift of the interest, it vests the principal also. *Lane v. Goudge.*(c) Sir William Grant, master of the rolls, in deciding that case, adopts the distinction which governs the present one. Here there is no absolute gift of the interest, but it is equally contingent as the gift of the principal.

[\*493] \*Mr. Lynch, in reply:—The natural construction is, that the interest is payable in the meantime and until the principal is to be paid; and that it is given in consequence of the postponement of the principal. *Stapleton v. Cheele.*(d)

The VICE-CHANCELLOR:—The expressed intention must prevail; and there is no gift, either of principal or interest, until the daughters attain twenty-one.[1] If the gift of the principal had been immediate, it would have borne

(a) 6 Ves. 239.

(b) 2 Mer. 363.

(c) 9 Ves. 225.

(d) 2 Vern. 673.

[1] Vide *Boddy v. Dawes*, 1 Keen, 362, where grandchildren to whom legacies were given on their attaining the age of twenty-one, were, on the construction of the particular will, allowed interest during their minority. In another case where stock was to be transferred to the legatee, on attaining the age of twenty-five, by the trustees of the will; yet according to the construction of

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interest only from the end of the year; and it cannot bear interest from an earlier period, because the payment is longer delayed. The executors would not be bound to make an investment, for the security of the legatees, until the end of the year.

## WILSON v. MOUNT.

1826, 24th January, and 4th April.—*Legacy.*

Bequest of money to trustees, upon trust to invest it in the public funds, and pay the dividends to A. until her marriage, and, upon her marriage, to transfer the stock to her; but in case she should die unmarried, then to transfer the stock to such person as she should by her will appoint; and in default of such appointment, to her executors or administrators. *Semle*, that she is not entitled to have the fund transferred to her while she remains unmarried.

AMONGST the bequests in the will of T. Fletcher was one as follows:—“I give to the said William Mount, John March, and Oliver Cromwell, the further sum of 1,500*l.*, upon trust to lay out and invest the same, in their names, or in the names or name of the survivor of them, in the purchase of three per cent. consols, and to pay and apply the interest [\*494] thereof, as the same shall from time to time become payable, to my niece, A. H. Mason, until the day of her marriage; and, upon the marriage of my said niece, A. H. Mason, I direct the said annuities, so to be purchased with the said 1,500*l.*, to be transferred to her the said A. H. Mason; but in case my said niece, A. H. Mason, shall depart this life unmarried, then upon trust to transfer the said bank annuities, so to be purchased with the said 1,500*l.* to such person or persons, and in such manner and form, as she the said A. H. Mason shall, by her last will and testament in writing, give, dispose and appoint the same; and, in default of such gift, disposition or appointment, then to the executors or administrators of the said A. H. Mason.”

At the hearing of the cause for further directions, on the 7th of July 1796, it was ordered that a sum of 2,035*l.* 5*s.* 6*d.* three per cent. consols, being then of the value of the legacy of 1,500*l.*, and interest, should be carried over to the credit of this cause, to an account intituled, “the account of Ann Harriet Mason;” and that the interest should be paid to her during her life; and, on her death, any person interested was to be at liberty to apply.

A petition was now presented by A. H. Mason (who continued still unmarried) praying to have the stock transferred to her, upon the ground that the form of the bequest gave her an absolute interest.

Mr. *Blenman*, for the petitioner:—It is plain, from the words of the will, that the testator intended that the whole subject of the bequest should

it, he was held entitled to the transfer when he reached twenty-one. *Saunders v. Vautier*, 1 Craig & Phillips, 240. See further *Judd v. Judd*, 3 Sim. 525. *Watkins v. Cheek*, ante 199. *Bredden v. Tugman*, 3 Mylne & Keene, 269. *Farmer v. Francis*, post 505.



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[\*495] \*vest, absolutely, in the petitioner. Two events only are mentioned: her marriage, and her dying unmarried, one or other of which must happen; and the gift, in either case, gives an absolute interest. In *Booth v. Booth*, (a) although there was only a direction to pay over upon marriage, and no express transmission of the fund in case of the legatee dying unmarried, it was held that the interest vested, and that the marriage was not a condition precedent.

Mr. *Tinney*, contra:—The gift to the executors or administrators of the lady, in case she should die unmarried and intestate, is not, necessarily, a gift of the absolute interest to the lady herself. The will expressly mentions one event only, upon the happening of which the fund is to be paid over, namely, marriage; and that has not taken place. In *Jennings v. Gallimore*, (b) a gift to the legal representatives of A., in default of appointment by A. himself, was held a gift to the representatives. *Evans v. Charles*, (c) was decided upon the same principle.

Where there is a doubt whether a gift, such as this, to the executors or administrators, may not mean something else than a gift to the party herself, the court cannot safely allow the fund to be taken out of court. In limitations of personal estate there is no analogy to the rule in *Shelly's case*; and there is no authority that a gift of personalty to A., followed by a gift to his executors, vests the whole interest in A.

The Vice-Chancellor said he considered that the language of the decree [\*496] precluded him from making the order prayed; and that it would be necessary to rehear the decree; and suggested that the right of the petitioner might be questionable; and that she ought to be well advised before she incurred the expense of a rehearing.

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SHARP V. HULLETT.

1826, 6th March.—*Practice.—Dismissal.*

The time for dismissing the bill for want of prosecution being arrived, and the plaintiff having become bankrupt, ordered that the bill be dismissed without costs, unless the assignees file a supplemental bill within three weeks.

THE plaintiff had become bankrupt. The defendants being entitled, according to the usual practice of the court, to move to dismiss the bill for want of prosecution; Mr. *Russell*, for the defendants, now moved that the plaintiff's assignees might file a supplemental bill, within ten days, or that the bill might be dismissed.

Mr. *Rose*, for the assignees.

The VICE-CHANCELLOR:—If, when the plaintiff becomes bankrupt, it were

(a) 4 Ves. 399.

(b) 3 Ves. 146.

(c) 1 Ans. 128.

1826.—*Henchman v. Attorney General.*

permitted to the defendant to dismiss the bill, in the usual course, for want of prosecution, it would necessarily subject the bankrupt to the payment of costs, when he has no means; which is against the general rule of this court as to bankrupts. And it might be attended with this further inconvenience, that the bill might be dismissed without the assignees knowing the fact that such a bill was filed, and without any opportunity of judging, on their part, whether it would or not be beneficial to the bankrupt's estate that the suit should be prosecuted. An order that the bill should be dismissed, without costs, within a limited time, if the assignees do not think fit to file a supplemental bill, obviates both these objections, provided the notice of motion is served on the assignees. On the other hand, it is hardly reasonable that a bill should be dismissed for want of prosecution, as against assignees, at an earlier period than it could, according to the course of the court, have been dismissed for want of prosecution, if the plaintiff had not become bankrupt; for that would be to deny to the assignees, who stand in the place of the bankrupt, the same time for being advised as to the propriety of continuing the suit, which was afforded to the bankrupt; although the assignees cannot equally be informed as to the subject of the suit. And this may sometimes be the effect of dismissing the bill at the end of three weeks, if the assignees do not file a supplemental bill at the end of that time. It appears, however, that this objection does not apply in the present case; because the state of the proceedings would now enable the defendant to dismiss the bill, for want of prosecution, if the plaintiff had not become bankrupt. Let the order, therefore, be made as prayed, that the bill be dismissed, if the assignees do not file a supplemental bill within three weeks; but without costs.

When a case occurs in which the motion prays a dismissal of the bill, if no supplemental bill be filed by the assignees at an earlier period than could have been the case if the plaintiff had not become bankrupt, it will be for the court to consider what ought to be the order which should then be made.[1]

\* *HENCHMAN v. THE ATTORNEY GENERAL.*

[\*498]

1826, 8th and 11th March.—*Heir.—Devise.—Prerogative.—Escheat.*

Devise of copyhold land in fee, upon condition that the devisee, within one month, pay 2,000*l.* to the executor, to be applied for charitable purposes; the testator having left no customary heir, and no next of kin: Held, that the devisee took the land subject to the payment of the 2,000*l.*, and that the crown (and not the lord of the manor) was entitled to the 2,000*l.* by prerogative, if personal estate, because there was no next of kin, and if real estate because there was no customary heir.

[1] Vide *Adamson v. Hull*, 1 Sim. & Stu. 249. In cases of dismissal of a bill on account of the bankruptcy of a plaintiff it is without costs. Case in the text. *French v. Barber*, 3 Beav. 296, n.; *Wheeler v. Malins*, 4 Madd. 171; *Randall v. Mumford*, 18 Ves. 424. Contra, *Mills v. Fay*, 3 Beav. 297, n. On death of sole plaintiff his representative will be ordered to revive, or that the bill be dismissed without costs. *Chowick v. Dimes*, 3 Beav. 290, (overruling, *Canham v. Vincent*

1826.—*Henchman v. The Attorney General.*

JOHN GIRLING, by his will, devised certain copyhold lands to William Henchman, his heirs and assigns, upon condition that he, within one month after the decease of the testator, paid to his executors a sum of 2,000*l.* which he desired should be taken as part of his personal estate, and disposed of in the same manner. And, after giving certain legacies, he disposed of the residue of his personal estate, including the 2,000*l.*, in favor of charities. The testator died without any customary heir or next of kin: and the questions in the cause were, whether the devisee took the copyhold estate discharged of the condition for payment of the 2,000*l.*; and if not, whether that sum belonged to the lords of the manor, or to the crown.

Mr. *Sugden*, and Mr. *Kindersley*, for the plaintiff, the devisee:—The crown cannot have any claim where there is a lord of the manor, as in this case; and the lord is not entitled where there is a tenant; therefore, the fund cannot be raised, but must sink in the land, for the benefit of the devisee. It must be admitted that the case stands on the footing of a trust; and, if on the footing of a trust, the case of *Arnold v. Chapman*(a) puts it out of all doubt, and makes it a trust for the heir; but, as there is no heir in this case, claims are made on behalf of the lords of the manor and of the crown.

[\*499] As to the lords of the manor, the only ground \*on which they can claim is escheat. The crown has other claims, besides what rest on the doctrine of escheat; for it claims in virtue of its prerogative, and on the ground of forfeiture. The question then is, whether there could be a good claim in this case on the ground of forfeiture. The true distinction is, that a claim by prerogative, never arises where there is an escheat, but only in the case of *bona vacantia*. The claim by escheat arises only where the crown claims *pro defectu hæredis*. If this, then, is a trust for the heir, and the crown claims for want of an heir, it can claim only by escheat; and that would be the only doctrine to govern this case. But it is unnecessary to go into the doctrine of escheat, to show that it is quite inapplicable to a trust of land. That was decided in *Burgess v. Wheate*.(b) All claim, therefore, on the ground of escheat, either by the lords of the manor or the crown, must fail. Then there remains for the crown the claim by prerogative only. But prerogative applies only to cases of personal estate, and where there is no personal representative. The claim on that ground, therefore, must also fail in this case. There is no case where the crown takes by prerogative for want of an heir.

Mr. *Skirrow*, for one of the lords of the manor:—The lord must stand in the place of the heir. The case is clearly a case of trust. In *Arnold v. Chapman*, Lord Hardwicke treated the money as land; and in *Burgess v. Wheate*.(c)

8 Sim. 277, where any order was denied.) Secus, as to the costs. *Jones v. Massey*, 3 Beav. 295, n. *Broune v. Warner*, *ibid.* 296, n. Where a feme sole plaintiff married, order to revive, or that bill be dismissed without costs. *Westropp v. Hesley*, Flan. & Kel. 141; *Wilkinson v. Charlesworth*, 3 Beav. 297, n. Secus, as to costs, *Johnson v. Harlock*, 3 Beav. 294, n.

(a) 1 Ves. 108.

(b) 1 Bla. 121; 1 Eden, 177.

(c) 1 Eden, 212.

1826.—*Henchman v. Attorney General.*

Sir Thomas Clarke, M. R., anticipated this very case, and plainly expressed an opinion that the trustee cannot be entitled; for he says, “If [\*500] the trustee came into a court of equity, I might be of opinion that he had no right; but have no occasion at present to enter into the merits of the defendant’s defence.” The trustee here must show that he has a better right than any of the defendants, and must recover by force of his own right. He cannot say that the right of another is extinguished for his benefit, especially here, because that would be contrary to the principle on which he took the estate. In *Burgess v. Wheate*, Lord Mansfield’s argument is in favor of the right of the lord by escheat. Two cases in particular were alluded to in the judgments which support that doctrine; *The Duke of York v. Marsham*, (d) and *Rex v. Holland*; (e) and Lord Mansfield, in his judgment, cites many cases, and alludes to the doctrines laid down in *Craig De Feudis*, to show that the lord is entitled where there is no heir. In the present case the condition would be entered on the court rolls; and inasmuch as the devisee could only be admitted upon the condition, he could never be permitted to claim, unless through performance of the condition. By this record, the devisee put himself in the situation of a trustee; and this court would never permit him to claim in contravention of the terms on which he was to take the estate. Where a man takes an estate upon a condition, the court will not allow him to say that he should have it on any other terms. In *Williams v. Lord Lonsdale*, (f) it was said, by Lord Loughborough, C. that the only point decided in *Burgess v. Wheate* was, that the crown was not entitled to come into chancery to make the heir a trustee for its benefit. *Middleton v. Spicer* (g) \*was a case of personal [\*501] property, and therefore cannot govern that now before the court.

Mr. *Shadwell*, and Mr. *Turner*, for another lord of the manor:—At the time of the death of the testator the titles of all parties had accrued, and so much of the 2,000*l.* as was not required for debts and legacies belonged to the person entitled to the land. In *Arnold v. Chapman* it was held, that the devisee could not take. The master has reported that there is no heir. It seems, therefore, clear, as there is no heir and no devisee to take, that the lord must be entitled. In *Middleton v. Spicer* there were certainly copyholds, as well as leaseholds; but the copyholds were sold in the testator’s life-time. In this case, the legal estate must have vested in the lord, if the gift had not been accepted; and there could be no equity to take it out of him.

Mr. *Wray*, for the crown, insisted that no case had been made out for the other claimants, and that the crown took by its paramount title.

Mr. *Sugden*, in reply:—It is impossible that the lord can be entitled, where there is a tenant on the rolls, who is subject to answer all feudal services. A will executed under a power over copyhold estates, operates as a mere devise under the statute of wills, and has no effect under the statute of uses. The claim of the crown is certainly more difficult to deal with than that of the

(d) *Hard*, 423.(e) *Alley*, 14.(f) 3 *Ves.* 752.(g) 1 *Bro. C. C.* 201.

1826'.—Henchman v. Attorney General.

lord. *Doreur v. Motteux*(*h*) shows real estate may be made to go [\*502] \*as if it were personal. There are two ways of considering the present case: 1st, taking it as personality; 2d, as real estate. But for whom has the court ever said, that money directed to be applied for an illegal purpose, should be raised? Never for any one but the heir. In *Williams v. Lord Lonsdale*(*i*) it was decided, that there was no equity on the part of the trustee, to compel the lord to admit him. In *Rex v. Cogan*,(*k*) the court of king's bench granted a mandamus to compel the lord to admit the legal tenant. Suppose this to be personal estate, then the case of *Middleton v. Spicer*(*l*) applies, subject to the material difference, that in that case the fund was personality from the beginning, and that the right of the crown was there established on the principle of *bona vacantia*. Lord Mansfield's argument in *Burgess v. Wheate*(*m*) has been overruled, with the approbation of the whole profession; and the rights of the crown cannot be now supported on the doctrines laid down in that argument. The master of the rolls, in that case, says:(*n*) "another case is put, of a purchase, and the money paid by the purchaser, who dies without heir, before any conveyance. Here 'tis said, if the lord could not claim the estate and pray a conveyance, the vendor would hold the estate he has been paid for, and keep the money too. I think the lord could not pray a conveyance. To say he could is begging the question. And as to the vendor's keeping both the estate and the money, it is analogous to what equity does in another case; as where a conveyance is made prematurely, before money paid, the money is considered as a lien on the estate, in the hands of [\*503] the \*vendee. So where money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor, for the personal representatives of the purchaser; which would leave things in *statu quo*."

And so, in the same case, Lord Northington, C., says,(*n*) "'Twas said, if a mortgagor die without heir, shall the mortgagee hold the land free? I answer, shall it escheat to the crown? No; because, in that case, the lord has a tenant to do his services, and that is the whole he is entitled to in law and equity."

Suppose that this were a case of freehold land, and that the crown was the immediate lord, it could only take in the same way as any other lord, and could not take while there was a tenant to do the services. As to this being a case of copyhold, that makes it much stronger against the crown; for the lord himself must die without an heir, before the crown can be entitled. Here the lord cannot take, because he has a tenant, and he cannot take money; and the crown cannot take, because its claim must come behind that of the lord. *Walker v. Denne*(*p*) decided that copyholds cannot escheat to the crown. In

(*h*) 1 Ves. 320.(*i*) 1 Bro. C. C. 201.(*o*) 1 Bla. 184.(*j*) 3 Ves. 752.(*m*) 1 Bla. 121.(*p*) 2 Ves. jun. 170.(*k*) 6 East, 431.(*n*) 1 Bla. 150.

1826.—*Farmer v. Francis.*

this case, therefore, the disposition by will being void, and the money not raisable, the devisee alone is entitled.

The VICE-CHANCELLOR :—The case of *Arnold v. Chapman* is expressly in point, that the devisee of the copyhold takes it, subject to \*the [\*504] payment of the 2,000*l.* That proportion of the 2,000*l.* which, by the effect of this will, would be applicable to the charities, necessarily fails. The lord of the manor cannot be entitled to it, because he takes only *propter defectum tenentis* ; and here he has his tenant, and has received his fine upon admittance. If there had been next of kin in this case, a question might have been raised, whether the testator did, or not, intend that this sum of 2,000*l.* should have all the same qualities as if it had been personal, and not real estate, at the time of his death. But the master having found that there were no next of kin, that question becomes immaterial.

The crown by force of its prerogative, though not by escheat, takes it ; if real estate, because there is no customary heir ; and if personal estate, because there are no next of kin.[1]

\*FARMER v. FRANCIS.

[\*505]

1826, 9th March.—*Will.—Construction.*

Residuary devise of real and personal estate to all the issue, child or children of M. F. as should be alive at the time of the decease of the survivor of two successive tenants for life, equally amongst them, if more than one, to be divided share and share alike, when and as they should respectively attain the age of twenty-four years, and to their respective heirs, executors, administrators and assigns for ever, as tenants in common ; held, that the children living at the death of the tenants for life, took absolute vested interests in the personal, as well as in the real estate.

WHEN this cause was heard before the Vice-Chancellor, he directed a case to be stated for the opinion of the court of common pleas, as to the construction of the residuary clause in the will of Edmund Farmer, so far as it related to the real estates. That case is reported in the 2d vol. of Mr. Bingham's Reports, p. 151. The cause now came on to be heard for further directions, upon the judge's certificate.

It was contended, on the part of the plaintiff, that, although the court of common pleas had certified that, as to the real estate, the defendants, the infants, took vested equitable estates in fee simple, as tenants in common, yet that it did not follow that the personal estate, which was comprised in the same gift, vested absolutely in them.

The gift of the residue was in the following terms :—“ And as to all the rest, residue and remainder of my estate and effects, wheresoever and of what nature or kind soever the same shall or may consist, at the time of my decease,

[1] Reversed on appeal by Lord Brougham, Ch., 3 Mylne & Keene, 495, and the devisee held entitled to that portion of the 2,000*l.* which failed.

1826 — Farmer v. Francis.

both real and personal, as well in possession, as reversion, remainder or expectancy, I do hereby give, devise and bequeath the same, and every part thereof, unto my wife Lucy, and Joshua Francis and John Hemmons, to take and hold the same, and every part thereof, unto my said wife, and the said

Joshua Francis, and John Hemmons, their heirs, executors, adminis-  
[\*506] trators and assigns for ever, upon trust, \*nevertheless, and to and for

the persons, uses, intents and purposes following; viz. upon trust, as to the rents, dividends, interest, use, produce and profits thereof, for the use and benefit of my said wife, for and during the term of her natural life, and, from and after her decease, upon trust for, and I do hereby give, devise and bequeath the rents, dividends and interest, use, produce and profits of the said last-mentioned trust estate, funds and effects, unto my daughter, Mary Francis, for her natural life, to and for her own, sole, separate and peculiar use, not subject or liable to the debts, receipts or engagements of her present or any after-taken husband or husbands, and over which I will and direct he or they shall have no power or control whatsoever, but that the receipt of my said daughter alone, notwithstanding her coverture, shall be, at all times, a good and sufficient discharge to the person or persons paying the same: and, from and after the decease of them my said wife and daughter, upon trust for, and I do hereby give, devise and bequeath the said residuary trust estates, hereditaments and premises, and the principal of the said residuary trust fund, property and effects, unto and amongst all and every the lawful issue, child or children of my said daughter, Mary Francis, as shall be living at the time of the decease of the survivor of them my said wife and daughter, equally amongst them, if more than one, to be divided share and share alike, when and as they shall respectively attain the age of twenty-four years, and to their respective heirs, executors, administrators and assigns for ever, to take as tenants in common, and not as joint tenants, and, if only one, then the whole thereof to such only or surviving child of my said daughter, Mary Francis, his or her  
[\*507] heirs, executors, \*administrators or assigns for ever, upon attaining the said age. But, in case there shall be no such issue, child or children of my said daughter, Mary Francis, living at the time of the decease of the survivor of them my said wife and daughter, or, being such, all shall die without lawful issue under the said age of twenty-four years, then upon trust for, and I do hereby give and bequeath the said residuary trust estates, hereditaments and premises, residuary trust fund, property and effects, unto my sons, Edmund and Titus Farmer, equally to be divided between them, share and share alike, and to their several and respective heirs, executors, administrators and assigns for ever, to take as tenants in common, and not as joint tenants, and to and for no other use, intent or purpose whatsoever."

Mr. Agar, for the plaintiffs, cited *Leake v. Robinson*, (a) and *Gilmore v. Severene*, (a)

Mr. Sugden, and Mr. Combe, for the children, cited *Doe v. Moore*, (c)

(a) 2 Meriv. 963.

(b) 1 Bro. C. C. 282.

(c) 14 East. 601.

1826.—Vansandau v Moore.

Mr. *Pepys*, for the executors.

Mr. *Turner*, and Mr. *Girdlestone*, junior, for other parties.

The VICE-CHANCELLOR:—There are, certainly, cases in which the same words have a different effect as applied to real and personal estate.[1] But such cases do not bear upon the present will.

\*In this case the residuary real and personal estate are given unto [\*508] and amongst all and every the lawful issue, child or children of the testator's daughter, Mary Francis, as should be living at the time of the decease of the survivor of them his wife and said daughter, equally amongst them, if more than one, to be divided share and share alike, when and as they should respectively attain the age of twenty-four years, and to their respective heirs, executors, administrators and assigns for ever, to take as tenants in common, and not as joint tenants. The court of common pleas has certified that the children of the testator's daughter, Mary Francis, who were living at the death of the survivor of the said wife and daughter, took estates in fee, as tenants in common in the real estates of the testator; and, as to the personal estate, they plainly take absolute, vested interests; the time of division only, as, in common cases, the time of payment, being postponed until they attain the ages of twenty-four years.[2]

\*VANSANDAU v. MOORE.

[\*509]

1826, 14th March.—*Præcise*.—*Answers*.

Fourteen directors of a joint stock company, against whom a bill was filed by a shareholder in the company for an account and dissolution of the concern, having filed fourteen separate answers with long schedules to each; each of the answers and schedules being, nearly *verbatim*, the same, and the defendants appearing all by the same solicitor, who had threatened to ruin the plaintiff by the costs of the suit; the court directed a reference to the master, to ascertain whether it was necessary or expedient, with a view to the defence, that separate answers should have been filed.

THE plaintiff was a shareholder in a joint stock company, called "The British Annuity Company;" and, on the 14th of May 1825, filed his bill against the directors of the company, praying for an account and a dissolution of the concern. Fourteen of the directors appeared to the bill by Mr. John Wilks, jun. as their solicitor, and filed fourteen separate answers to the bill; to each

[1] Vide *Watkins v. Cheek*, ante 204.

[2] Cases where a legacy has been held to vest, before the legatee's attaining the age appointed for payment. *Watkins v. Cheek*, ante 199; *Thackeray v. Hampson*, ante 214; *Bland v. Williams*, 3 Mylne & Keene, 411; *Saunders v. Vautier*, 1 Cr. & Ph. 240; *Blease v. Burgh*, 2 Beav. 221. A gift which in terms purports a present vested interest, with a postponed time of payment, is not made contingent by a direction to accumulate till the time of payment arrives; and a gift over, which is too remote and void, cannot, it seems, defeat the vested interests previously given. *Blease v. Burgh*, ubi supra. Further as to the vesting of legacies, and the distinction between legacies charged upon land, or payable out of the personal estate, see *Paterson v. Ellis' executors*, 11 Wend. 259; *Birdsall v. Hewlett*, 1 Paige, 33; *Mareh v. Wheeler*, 2 Edw. 156.



1826.—Vansandau v. Moore.

of which a long schedule was annexed. Each of the answers and schedules appeared to be, almost *verbatim*, the same.

The court was now moved, on behalf of the plaintiff, that it might be referred to one of the masters to inquire if these fourteen answers were substantially, or in any and what respects, different; and whether there was any and what sufficient reason for such fourteen defendants, or any and which of them, so answering separately: and if the master should find that there was a sufficient reason for the said fourteen defendants, or any of them, answering separately, then to inquire whether there was any and what sufficient reason for repeating the schedule annexed to each of the answers; and that, for the purpose of those inquiries, the fourteen defendants might be directed to furnish the master with copies of such answers.

The plaintiff (who was a solicitor) stated, in his affidavit in support of the motion, that he had examined and compared the fourteen answers and [\*510] schedules, and found that they were all of them alike, and nearly *verbatim* copies of each other; and that they in no respect materially differed from each other, but appeared to have been prepared from one draft only; that although all of them were sworn in London, and several of them on the same day, and all, except one, in the month of August, yet that each of the defendants had answered separately; that each of the answers consisted of 627 folios, amounting altogether to 8,778 folios; and that the schedules to each answer consisted of 423 folios; and that the charge for office copies of the fourteen answers would amount to 365*l.*; that Wilks, as well as many of the fourteen defendants, had declared that their sole object in putting in separate answers to the bill, was to increase the expenses of the suit, and thereby to deter the plaintiff from further prosecuting it; that, as evidence of this intention, Wilks, in reply to a letter written to him by the plaintiff, remonstrating on the vexatious conduct pursued on behalf of the defendants, wrote to the plaintiff a letter, of which a part was in the following terms:—

“As your suit is frivolous, absurd and vexatious; as you have no more to do with the company and its concerns than an inhabitant of Ethiopia, and as the costs must ultimately ruin you, even to beggary, and, therefore, in the end, some of them, at least, fall upon the company, I shall oppose, for myself and for my clients, your ridiculous and contemptible suit, by every legal means.”

The affidavit also stated, that Wilks had, without any sufficient or proper reason, and solely for the purpose of multiplying the costs of the suit, [\*511] taken out 47 separate orders for time to answer, for the several defendants, and that the answers had been prepared by Wilks, for the same purpose, and were not prepared upon the statements and instructions of the defendants themselves. It then set forth several facts and part of a correspondence as to the answer of one of the defendants, to whom a copy of an answer, similar to those of the other fourteen defendants, had been sent by Wilks, but which that defendant refused to adopt.

Mr. Heald, Mr. Pepys, and Mr. Knight, in support of the motion:—This

1825.—*Vansandau v. Moore.*

is, certainly, a motion quite novel in its nature; but if the practice, which has compelled the plaintiff to come to the court for some protection against the oppressive course of defence which has been pursued in this case, is to prevail, it must become quite impossible for the suitor, unless he is very rich, to prosecute his cause at all. The case made by the bill is not against the defendants, as individuals, but against the company collectively, and against the defendants collectively, as the directors of the company. The course now complained of is pursued for the deliberate purpose of harassing and impeding the plaintiff in the prosecution of the suit; for it is to be observed that the mode in which Mr. Wilkes' letter states it to be his intention to ruin the plaintiff, is not by the decision of the court, but to make it impossible for him to go on, by reason of the expenses which will be heaped upon him by the manner of conducting the defence.

Mr. Hart, Mr. Shadwell, and Mr. Wakefield, for the defendants:—The plaintiff should come with clean hands into court. His bill is an attempt at extortion. He persisted in going on with his suit, even [\*512] after being distinctly offered all that he could ask. The bill calls upon the defendants to answer, "severally and respectively, upon their several and respective oaths." How then can the plaintiff ask to be indemnified against the consequences of that which his bill expressly requires from the defendants? There is no rule of the court to compel defendants to answer jointly. The signature of counsel is sufficient sanction for the court as to the propriety of the mode of defence, and is enough to bind the court in that respect. No doubt, when the case comes on to be heard, the court may then consider the manner in which the defence had been conducted, and inflict costs, if there has been any proceeding which turns out to be unjustifiable or oppressive.

The VICE-CHANCELLOR:—Fourteen defendants, having a common interest, and appearing by the same solicitor, think fit to file fourteen separate answers, of great length, and almost in the same words, not for any purpose of expediency, with a view to the defence of any of the parties, but solely for the purpose of impeding the plaintiff in the prosecution of the suit. It is plainly the duty of the court to check such conduct. It is of no avail to say, that the bill is itself absurd and vexatious. This is not the proper time for inquiring into the nature of the bill. Whatever it is, the defence to it should be fairly and properly made. I cannot, however, adopt the terms of the notice of motion. But I shall make an order for a reference to the master to inquire whether, with a view to defence in the cause, it was necessary or expedient, on the part of the fourteen defendants, or any and which of them, who have filed their answers, through the intervention of Mr. [513] Wilkes, as their solicitor, that separate answers should be filed by each defendant; and, if the master should, as to any of the defendants, find that it was not necessary or expedient, with a view to their defence, to put in separate answers, then let the master inquire how it happened that such separate

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 1826.—*Hasker v. Sutton.*


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answers were put in ; and let the master be at liberty to state any matter specially at the request of any party.

On appeal to the Lord Chancellor this order was reversed.[1]

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### HASKER v. SUTTON.

1826, 15th March.—*Vendor and purchaser.*

Specific performance decreed, although the vendor's title was founded on the destruction of contingent remainders.

THIS was a suit, by the vendor against the purchaser of an estate, to compel a completion of the purchase. The title having been objected to, the Vice-Chancellor, at the hearing of the cause, directed a case to be stated for the opinion of the court of common pleas, as to the estate which the plaintiff had in the property. The judges certified that the plaintiff had an absolute estate of inheritance, in fee simple.(a) Upon the cause coming on for further directions the Vice-Chancellor concurred in opinion with the judges. But the defendant's counsel objected that, as the title was founded on the destruction of contingent remainders, the court would not decree a specific performance of the contract. The Vice-Chancellor said that he was ready to

hear the defendant's counsel argue in support of their objection. But [\*514] upon the case of *\*Kean v. Corbett*(b) being mentioned, in which the

Lord Chancellor had expressed a strong opinion in favor of a title similarly circumstanced, but had made no decree, owing to the purchaser having become insolvent, the defendant's counsel withdrew their objection, and his honor decreed a specific performance, without costs.

Mr. Preston, and Mr. Barber, for the plaintiff.

Mr. Sugden, and Mr. Pemberton, for the defendant.

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### EDWARDS v. BOWEN.

1826, 15th March.—*Certiorari.*

Plaintiff had removed the proceedings in a replevin from a county court in Wales to the court of great sessions, and then applied to this court for a certiorari to remove them into the king's bench ; the court granted the writ, without requiring the plaintiff to show any special ground for it.

THE plaintiff commenced a replevin in a county court in Wales, in which his title to the inheritance would have come in question, and afterwards removed the proceedings into one of the courts of great sessions, by the writ of *recordari facias loquelam*. He now applied to this court for a certiorari to remove the proceedings into the court of king's bench.

(a) See 1 Bing. 500.

(b) Not reported.

[1] 1 Russ. 441.

1826.—Higginson v. Barneby

Mr. *Knight* and Mr. *Chilton*, in support of the motion cited *Zinck v. Langton*, (a) *Rex v. Eaton*, (b) *Rex v. Jukes*, (c) *Jones v. Davis*, (d) *Patterson v. Eades*. (e)

Mr. *Wakefield*, contra, said that the cases cited did not apply; that a certiorari did not lie in such a case \*as the present, or lay only upon [\*515] sufficient ground being shown to the court, which had not been done here; that the plaintiff had preferred the most inconvenient mode of trying his right to the freehold, one which compelled him to try it in Wales, and then complained that he was forced to try it there.

The VICE-CHANCELLOR :—In the text writers there is no qualification stated as to the right of the plaintiff to the writ of certiorari in all cases; and the subject is not to be deprived of a beneficial writ in the particular case, merely because he is not prepared with a precedent, precisely in point. If, however, it be necessary for the plaintiff here to lay a special ground for the writ, it is a sufficient ground that, in all other cases, the plaintiff has an election to proceed either in the superior or inferior court; but, in replevin, the action must commence in the sheriff's court. (f)

\*HIGGINSON V. BARNEBY.

[\*516]

1826, 17th March.—Will.—Power.—Settlement.

A will directed a settlement to be made of real estate on A. and his first and other sons, in tail, with powers of jointuring, leasing, sale and exchange, and all other clauses, powers and provisos usually inserted in settlements of the same kind: Held that these last words did not authorize the insertion of a power to charge with portions.

WILLIAM HIGGINSON, esquire, devised all his real estates to trustees, upon trust, from time to time, until one of the younger children, after named, of his niece, Elizabeth Barneby, should attain his age of twenty-two years, and until a conveyance of his estates should be made and executed as after directed, to receive the rents, issues and profits of his estates, and also of the estates after directed to be purchased with the clear residue of his personal estate, and apply so much thereof as his trustees should deem necessary in the repair and keeping in order his estates, and in payment of the maintenance after directed, and to invest the residue of the rents, issues and profits in the purchase of other real estates: and he directed that when his great nephew Edmund Barneby, the third son of Elizabeth Barneby, should attain the age of twenty-two years, the trustees should convey all his estates, and all other the lands and hereditaments by his will directed to be purchased, unto his great nephew Edmund Barneby, and his assigns, for his natural life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with

(a) Doug. 721.

(b) 2 T. R. 89.

(c) 8 T. R. 542.

(d) 1 Barn. & Cross. 143.

(e) 3 Barn. & Cross. 550.

(f) See Mitf. 40, and cases there cited.

1826.—*Higginson v. Barneby.*

remainder to the use of the first and other sons of Edmund Barneby, successively, in tail general; with remainder to William Barneby, the second son of his niece Elizabeth Barneby, for his life, with remainder to trustees to preserve contingent remainders; with remainder to the first and other sons of

William Barneby successively in tail general; with remainder to the [\*517] testator's own right \*heirs: and the testator directed that in the settlement should be contained a power for his great nephews respectively, when in the actual possession of the hereditaments and premises thereby devised and directed to be purchased, but not otherwise, to charge the same hereditaments, or any competent part thereof, with any sum by way of jointure to a wife upon his marriage, in the proportion of 100*l.* per annum for every 1,000*l.* fortune he might receive with his wife, to the extent of 500*l.* per annum, being the only charge then existing or made under such power; and if a second or after charge should be made, such second or after charge not exceeding 250*l.* per annum, until the former charge for jointure should be at an end: and his will also was that in the settlement should be contained a power to the trustees of his will, to sell or exchange any part of the hereditaments thereby devised or to be purchased under the trusts of his will; and also a power for the persons in possession of the lands and hereditaments thereby devised and to be purchased, and for his trustees in the meantime, to lease the same for twenty-one years, in possession, at rack-rents: and that there should also be contained in such settlement all other clauses, powers and provisoes as are usually inserted in settlements or deeds of that kind. And he gave and bequeathed the residue of his personal estate to the same trustees, in trust to invest the same in purchases of real estate, to be conveyed to his trustees, or to such person as they should appoint, to, for, and upon the same uses, trusts, intents and purposes, and under and subject to the same limitations, powers, restrictions, conditions and agreements as were thereinbefore limited and appointed concerning his estate thereinbefore devised.

[\*518] \*The rents of the estates devised by the will, and purchased after the testator's death, produced 3,740*l.* per annum; and the interest of the residuary personal estate, and the accumulations of the rents of his real estates, not then invested in the purchase of real estates, amounted to 7,600*l.* per annum, making a total income of 11,340*l.* per annum.

Edmund Barneby having attained twenty-two, and a settlement having been prepared in pursuance of the will, a question arose, upon a petition presented by him, whether the will authorized a power to charge the estate with portions for younger children to be inserted in the settlement?

Mr. *Horn*, and Mr. *Phillimore*, for the petitioner, contended that the direction that there should be contained in the settlement all such other clauses, powers and provisoes, as were usually inserted in settlements of that kind, did authorize the insertion of such a power.

The Vice-Chancellor was of opinion that, under these words, the court had no authority to insert in the settlement a power to appoint portions to younger

1826 — *Bensley v. Burdon.*

children ; because the effect of such a power would be to diminish the estate, which was expressly limited in strict settlement ; and because there was no certain rule as to the quantum of such portions, by which the court could be guided. He considered the words as referring to usual and necessary powers of management.

## \*BENSLEY v. BURDON.

[\*519]

1826, 24th February and 13th April.—*Estoppel.—Lease and release.*

A conveyance by lease and release will operate as an estoppel ; and where the releasee can have the benefit of the conveyance at law, this court will not interfere in his behalf.

By indentures of lease and release of the 27th and 28th days of February 1803, made between Francis Tweddell of the first part, John White of the second part, and Peter Tahourdin and Gilbert Tahourdin of the third part, after reciting that Francis Tweddell, under the will of his grandfather, was entitled to a remainder in fee, expectant upon the determination of the life estate of his father, Francis Tweddell, in certain real estates therein described, Francis Tweddell the son, in consideration of 2,200*l.*, granted to White an annuity of 264*l.*, and charged the same upon the real estates to which it was recited that he was entitled, with the usual powers of entry and distress thereon after the death his father ; and, for more effectually securing this annuity, he conveyed to Peter Tahourdin and Gilbert Tahourdin, and their heirs, "all that the reversion or remainder in fee expectant and to take effect upon the decease or other sooner determination of the estate for life of the said Francis Tweddell the elder, and all other the contingent and reversionary estate, title and interest of him the said Francis Tweddell the younger, of and in, &c." (describing the real estates mentioned in the recital) upon trust (in case the annuity should be nine months in arrear) to sell the same, and thereout to pay all arrears, and to invest the surplus in the purchase of stock, and apply the interest and dividends of such stock from time to time in payment of the annuity. And the indenture of release contained a covenant on behalf of Francis Tweddell the son, for further assurance.

\*By other indentures of lease and release of the 23d & 24th of [\*520] January 1804, made between Francis Tweddell the younger of the first part, Alexander Burdon of the second part, and Edward Mammatt and Andrew L. Sarel of the third part, after a recital as to the Tweddells' interest in the real estates, similar to that contained in the preceding deed, and also a recital of the annuity granted by that deed, the defendant Francis Tweddell, in consideration of a sum of 4,200*l.*, granted an annuity of 700*l.* a year to the defendant Alexander Burdon, and charged this annuity in like manner upon the estates, and conveyed the estates (expressly subject to the annuity of 264*l.*

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charged upon them by the first-mentioned deed) to the defendants Mammatt and Sarel, as trustees for the defendant Burdon, with a power of sale, and a direction as the application of purchase money, similiar to those contained in the first-mentioned deed.

These estates had been devised to Francis Tweddell the father, for life with remainder to his first and other sons in tail. The defendant Francis Tweddell was the second son. In the year 1793, the eldest son, having attained his age of twenty-one years, concurred with the father in suffering a recovery and declaring uses, under which, at the time when the annuity deeds were executed, Francis Tweddell the father had an absolute power over the whole fee simple of the estates, the elder brother being then dead without issue, and Francis Tweddell the son had no interest whatever in them. In 1805 the father died, having, by his will, devised to the defendant Francis Tweddell an estate for life, without impeachment of waste, in part of the estates in question.

[\*521] \*The defendant Francis Tweddell, soon after the death of his father, conveyed all the real property which he derived under the will of his father, including his life estate before mentioned, to the defendant A. Burdon, upon trust to sell the same, and out of the produce to retain 6,987*l.*, which was mentioned to be due to him from the defendant Francis Tweddell, and which was partly made up of the arrears of the annuity, and the money paid by Burdon for the purchase of it.

In 1815 White became a bankrupt.

The bill was filed by his assignees against Burdon and the trustees of both the annuity deeds. After stating the various facts already mentioned, it charged, amongst other things, that, although the defendant Tweddell had not at the time of granting the annuities, the estate which he represented, yet that he was estopped from saying that he had not such estate, as a reason why the annuity granted to White should not be charged upon that part of the estates comprised in the annuity deeds, to which he had become entitled as tenant for life. It also charged that the defendant Burdon gave no consideration for the conveyance of the life estate; and that the sum of 6,987*l.*, which was the pretended consideration for that conveyance, consisted merely of the 4,200*l.*, the consideration money for the purchase of Burdon's annuity, together with arrears of that annuity.

It prayed that it might be declared that the life interest in that part of the estates devised to the defendant Tweddell, was chargeable with the [\*522] annuity granted to White, and that the conveyance of the life \*estate to Burdon was void as to the plaintiffs, or was subject to White's annuity; and that a proper deed might be executed by all necessary parties, for charging Tweddell's life estate with that annuity, and conveying that estate to trustees for that purpose; and that an account might be taken of the arrears of that annuity, and of the rents and profits of the estates, since the death of Francis Tweddell the father, which had come to the hands of Burdon, and

that he might be compelled to pay to the plaintiffs what should be found due upon taking that account, in satisfaction of the arrears of White's annuity.

The most material facts were admitted by the answer; but Burdon denied that the sum of 6,987*l.* arose entirely in respect of the annuity granted to him by the defendant Tweddell.

Mr. *Sugden*, and Mr. *Cooper*, for the plaintiff:—To the extent of securing the annuity, the deeds of February 1803 operate by way of estoppel. But, whatever be their operation at law, it is quite clear that, if a person assumes to sell an estate in which he has then no interest, and he afterwards acquires an interest, this court would, on a bill being filed against him by the purchaser, compel him to execute a conveyance. And it is equally clear that a purchaser from him, with notice, would stand in the same situation as the vendor.

In the present case as the 6,987*l.* was a mere substitution for the annuity, if the equity was good against Francis Tweddell the younger, it is good against Burdon; especially as he claims subject, expressly to White's \*annuity. *Edwards v. Rogers*; (a) *Trevivian v. Lawrence*; (b) the [\*523] judgment of L. Kenyon, C. J. in *Goodtitle v. Morse*; (c) *Whitfield v. Fausset*; (d) *Wright v. Wright*; (e) and the judgment of Eyre, C. B. in *Morse v. Faulkner*, (f) and *Smith v. Law*. (g) *Si alienum fundum vendideris, et tuum postea factum petas, hac te exceptione recte repellendum. Si a Titio fundum emeris qui Sempronii erat, isque tibi traditus fuerit, pretio autem soluto Titius Sempronii hæres extiterit et eundem fundum Mævio vendiderit et tradiderit, Julianus ait æquius esse priorem te tueri.* (h)

Mr. *Heald*, and Mr. *Ellison*, for the defendant, Burdon:—The object of this bill is to compel a specific performance of the covenant for further assurance. Now the court will not enforce the specific performance of a covenant by an expectant heir, for a sale of his expectancy. *Johnson v. Nott*. (i) The right of a purchaser, who has got a defective title, to file a bill for relief under the covenant for further assurance, is a qualified one. (k) It is consistent with the pleadings that F. Tweddell the son, when he granted the annuity to White, was not aware that a recovery had been suffered; therefore the covenant was entered into under a mistake, and this court will not grant any relief founded upon it. *Hitchcock v. Giddings*. (l)

Mr. *Girdlestone, jun.* for the trustees.

\*The VICE-CHANCELLOR:—In this case the plaintiffs appear to me [\*424] to be entitled to relief at law upon the ground of estoppel. The defendant Tweddell having averred in the deed of release, which, as it regards the annuity, is also a deed of grant, that he was seised of a remainder in fee expectant upon the death of his father, if the plaintiffs were now to proceed by entry or distress, according to the terms of the deed, and the defendant

(a) Sir W. Jones, 459.

(e) Ibid. 409.

(i) 1 Vern. 271.

(b) 6 Mod. 258.

(f) 1 Ans. 14.

(k) Sug. Vend. 6th ed. 564.

(c) 3 T. R. 369.

(g) 1 Atk. 489.

(d) 1 Vez. 387.

(h) Dig Tit. 3.

(l) 4 Price, 135.



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Tweddell were in possession of the premises, he would be estopped from stating that at the time of the grant he was not duly seised of the estate in question according to the averments of the grant. Estoppel runs with the land, and binds not only the party, but all who claim under him:[1] and the plaintiffs have therefore the same remedy against the possession of the defendant Burdon, as they would have had against the possession of the defendant Tweddell. The prayer of the bill is, that it may be declared that the estate and interest which the defendant Tweddell took in the premises in question, under the will of his father, became, and are chargeable with the payment of the annuity, subject to the term of 2,000 years. This is already declared by the law, upon the ground of estoppel.

The bill then prays that it may be declared that the conveyance of such life estate and interest to the defendant Alexander Burdon, is void as against the plaintiffs; or that the same was and is subject to the payment of the said annuity, or the arrears thereof. This also is already declared by the law, upon the same ground. The bill then prays that the defendant, A. Burdon, may be decreed to join with all proper parties in executing a proper [\*525] deed for charging the life estate and interest\* of the defendant Francis

Tweddell, in the said undivided moiety of the said hereditaments and premises, with the payment of the said annuity of 264*l.*, and with the like powers of distress and entry in case of non-payment, as are contained in the said indenture of the 28th February 1803; and for conveying the said undivided moiety of the said hereditaments and premises to the defendants P. Tahourdin and Gilbert Tahourdin, upon such trusts as may be most proper for securing the payment of the said annuity. But the life estate of the defendant F. Tweddell is already, upon the ground of estoppel, effectually charged, as against the defendant Alexander Burdon, and all who can claim under him, by the very indenture of the 28th of February, 1803. And, in like manner, and by the same deed, the life estate of the defendant, F. Tweddell, is already conveyed to the defendants, the Tahourdins, upon the trusts of that indenture; and the plaintiffs cannot be entitled to have it conveyed upon any other terms. The bill then concludes with a prayer for the consequential accounts of rents and arrears of the annuity. In effect, therefore, the relief which is sought by this bill, is the relief which the law affords. It is said, however, that the law does not afford relief in respect of the trust estate, conveyed by the lease and release of 1803 to the defendants, the Tahourdins, and that estoppel cannot be worked by lease and release, and therefore it was necessary to come into equity: and this point was treated at the bar as too clear for argument. My impressions were otherwise; and I requested that the case might be a second time argued upon that point alone; and, after hearing that second argument, I am confirmed in my opinion that estoppel is as well worked by an indenture of release as by any other indenture, and, consequently, that the estate

[1] *Vide Jackson v. Parkhurst*, 9 Wend. 209.

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of the \*Tahourdins is the same as if the defendant Tweddell had, at [\*526] the date of the release of 1803, been legally seized of the remainder in question, and, as I have already stated, required no new conveyance from the defendant, Burdon. The conveyance by lease and release, like all other conveyances that owe their effect to the statute of uses, will pass only such estate as the party conveying may lawfully pass; because the consideration paid to the party conveying cannot raise a use in any other estate than his own. But estoppel applies only to cases where the passing of an estate does not come into question. The text-writers upon this subject state that estoppel is wrought by any deed intended, making no exception as to the indenture of release: nor can I find a single authority where such a distinction is taken. Where by deed indented a man represents himself as the owner of an estate, and affects to convey it for valuable consideration, having at the time no possession or interest in the estate, and where nothing therefore can pass, whatever be the nature of the conveyance, there, if by any means he afterwards acquire an interest in the estate, he is estopped in respect of the solemnity of the instrument from saying, as against the other party to the indenture, contrary to his averment in that indenture, that he had not such interest at the time of its execution.[1] Is not an indenture of release as solemn an instrument as any other indenture? Of what importance to this principle can it be, whether the indenture which operates this effect by its mere character as a solemn instrument, is an indenture of release or an indenture of feoffment?[2]

The plaintiffs have, therefore, their remedy at law, and I am not aware of any circumstances in this case which \*compel them to seek [\*527] equitable relief, or of any principle which can entitle them in equity to a different relief from that which the law affords to them. It has been argued that, admitting the estate in the Tahourdins to be effectual by way of estoppel, yet it was still necessary for the plaintiff to come into equity, because the right to sue at law is in them alone. It may be observed that the trust in the Tahourdins is merely a trust to sell, and, under all the circumstances, could hardly be exercised beneficially for the plaintiffs. But suppose it were otherwise, no case is made in this bill that it is necessary for the plaintiffs to come into equity for relief against their own trustees; and, on the contrary, the bill seeks a new conveyance to the same trustees. This case is not, therefore, made by the bill; but if it had, the court would probably not have done more than to direct that the plaintiffs should be at liberty to sue in the names of their own trustees.

Let the bill, therefore, be dismissed; but, considering the nature of the defendant's title, and that upon the grounds upon which the court proceeds the

[1] Vide *Van Horne v. Crain*, 1 Paige, 459.

[2] As to estoppel by deed see *Jackson v. Murray*, 12 Johns. Rep. 201. *Whitlock v. Mills*, 13 Johns. Rep. 463. *Jackson v. Wright*, 14 Johns. Rep. 193. *Sinclair v. Jackson*, 8 Cow. 543. *Jackson v. Stevens*, 16 Johns. Rep. 110. *Barber v. Harris*, 15 Wend. 615. *Jackson v. Waldron*, 13 Wend. 178.

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 1826.—Attorney General v. Dyson.
 

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bill might have been demurred to, and the great expense of the suit avoided, let the bill be dismissed without costs.

[\*528]

\*THE ATTORNEY GENERAL v. DYSON.

1826, 10th April.—*Exceptions.*

Exceptions cannot be taken to a master's report approving of new trustees; nor will the court interfere with the report of the master where there is no complaint that the persons approved of by him are unfit.

This was a petition, by way of exception to the master's report, on the ground that the master had approved of improper persons to act as trustees of a charity. The petition insisted that the master ought to have approved of other persons who had been proposed as trustees.

Mr. *Hart*, and Mr. *Duckworth*, for the petition.

Mr. *Agar*, and Mr. *Barber*, contra.

The VICE-CHANCELLOR :—The case of trustees is within the same principle as that of receivers.[1] The court will not enter into the consideration of comparative fitness; and there is no complaint here of unfitness on the part of the trustees named by the master.

Petition dismissed.

[\*529]

\*DRYDEN v. ROBINSON.

1826, 19th April and 24th May.—*Plea.—Award.*

An award made under an agreement, entered into after a bill is filed, to refer the whole subject-matter of the suit to an arbitrator, may be pleaded to the bill.

But where all the parties to the suit were not parties to the award (although the plaintiff was a party to it) and where part of the prayer of the bill was for the execution of the trusts of a deed under which some of the parties to the suit were interested who were not parties to the award, a plea of the award was ordered to stand for an answer, with liberty to except.

By indentures of lease and release, dated the 21st and 22d of September 1821, the plaintiff conveyed certain real estates to the defendant Abraham Dawson, on trust to sell them, and out of the proceeds to pay to the defendant Robinson two sums of 800*l.* and 400*l.*, and to pay to the defendants Roddam and Bell a sum of 300*l.*, and to pay the surplus to the plaintiff. By another indenture, dated the 2d of May, 1823, the plaintiff charged the same estates with the further sums of 200*l.* 100*l.* and 510*l.* in favor of the defendant Robinson, and also with such further sums as Robinson might pay in consequence of his having become a surety for the plaintiff's brother, in respect of a sum of 300*l.*; and also with such sums as Robinson and Dawson might pay for repair-

[1] Vide *Shewell v. Jones*, ante 170.

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ing the premises or keeping them insured from fire ; and, after satisfying these charges, the produce of the sale of the estate was to be applied in payment of the joint debts of the plaintiff's brother and his partner in trade, and the surplus only to the plaintiff.

The bill prayed that the indenture of May 1823 might be declared to be fraudulent and void, and be delivered up to be cancelled ; and that the defendant Dawson might apply the purchase-money of the estate according to the trusts of the indenture of September 1821.

All persons interested under both deeds were made defendants.

\*To this bill the defendant Robinson pleaded, in bar, that, by a cer- [\*530]  
tain indenture, bearing date the 24th of February 1824, (being after  
the filing of the bill) made between the defendant Robinson of the 1st part, the  
plaintiff of the 2d part, and John Lindsay Angus of the 3d part, it was agreed  
that the subject-matter of the suit in chancery, and the disputes and differences  
between the parties respecting the same, should be referred, to two arbitra-  
tors, therein named: that the arbitrators duly made their award in writing, on  
the 12th of July 1824, and thereby confined the indenture of May 1823, and  
all the charges and trusts therein contained, except those for securing the  
payment of 510*l.* to the defendant Robinson, and awarded that Robinson had  
no claim upon the plaintiff in respect of that sum, or any part of it ; and they  
further awarded that nothing therein contained should be construed to preju-  
dice or affect the right of any trustee under the indenture of the 2d of May  
1823 to retain, out of the proceeds of any sale thereby referred to, any expenses  
which he or they were or was, or otherwise might be entitled to retain in  
carrying such sale into effect ; that the said John Lindsay Angus was entitled  
to the principal sum of 200*l.* from the plaintiff, with interest thereon at the rate  
5*l.* per cent per annum, to be computed from the 2d of May 1823 until the  
same should be paid ; that the said principal sum and interest should be a charge  
upon the messuage and other hereditaments comprised in the indenture of the  
2d of May 1823, and be paid out of the proceeds of the sale authorized to be  
made by an indenture of release therein mentioned of the same messuage and  
other hereditaments ; that the plaintiff and the defendant Robinson re-  
spectively, and their respective proper representatives \*should, at their [\*531]  
own respective costs and charges, make, do and execute all such deeds,  
matters and things as should be necessary and expedient, or as the counsel of  
John Lindsay Angus, his executors, administrators or assigns should require,  
to make such last-mentioned charge available ; that the plaintiff should forth-  
with cause the bill, exhibited by him against Robinson and others, to be dis-  
missed ; and that the defendant Robinson, or others the defendants to that bill,  
should consent, at his or their own expense, that the bill might be dismissed,  
without any costs to be paid to them or any of them ; and that the costs of the  
reference and of the award, amounting to 97*l.* 17*s.* 8*d.*, should be paid by  
Robinson and the plaintiff in equal shares.

Mr. Heald, and Mr. Skirrow, for the plea :—The matter pleaded is a com-

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plete bar to the suit. The plaintiff may enforce the award, at law, by an action on the bond, or, by an attachment in the court in which the award has been made a rule.

Mr. *Sugden*, and Mr. *Garratt*, for the bill :—It has been decided that a plea is not the proper mode of using such matter as a defence. *Rowe v. Wood*,<sup>(a)</sup> was a case quite similar to the present. It was there held that an agreement made between the parties, after the bill was filed, could not be pleaded in bar of the suit. The defendant ought to apply, by motion, to stay proceedings in the suit.

There are other objections to the plea :

[\*532] \*1st. It does not sufficiently aver the identity of the various instruments :

2d. The award is bad on the face of it ; for the reference was only between three persons ; whereas this bill is filed against other persons, who have sums charged upon the estate in question : and it prays that the deed of 1823 may be set aside as to all the parties, except as to sums actually advanced upon it :

3d. This is a plea in bar to the bill. But it is settled that a plea of any matter subsequent to the filing of the bill, should be a plea to the further prosecution of the suit. The difference is that, by a plea in bar, the bill is dismissed with costs, whereas the award is that it should be dismissed without costs.

Mr. *Skirrow*, in reply :—There is no authority for the position that proceedings in the suit could be stayed by a motion in such a case as this. On the contrary, *Hutchinson v. Dodgson*,<sup>(b)</sup> is an express authority that there must be a plea, and that a motion is not the proper course.

The VICE-CHANCELLOR :—The decision of the arbitrators, that the defendant Robinson is entitled to the benefit of the indenture of May 1823, except as to the sum of 510*l.*, cannot conclude this suit, which is, in effect, for the administration of the trusts of the deed of 1821, and also of the deed of 1823. And

other parties besides Robinson, who are no parties to the award, have [\*533] an interest in the trusts of the deed. Yet, if this plea were allowed, the defendant Robinson would no longer be a party to the suit ; and, without him, the court would not have power to administer the trusts of either deed. For this reason I cannot allow this plea ; but will let it stand for answer, with liberty for the plaintiff to except to it. It may, however, be found, at the hearing of the cause, that the award of the arbitrators will be considered as the measure of the right of the defendant Robinson, and that the plaintiff will prosecute the suit at the hazard of paying those costs from which he would be protected by the award, if he had acted under it.[1]

(a) 1 Jac. & Walk. 315. See *Turner v. Robinson*, ante, 1 vol. 3.

(b) 2 Ans. 361.

[1] The rules as to allowing a plea to stand for an answer, are thus stated by Chancellor Walworth : " If a plea contains nothing which can be a valid defence to any part of the matters which it professes to cover, it will not be allowed to stand for an answer, but should be absolutely over-

1826.—*Fain v. Ayers.***FAIN v. AYERS.**1826, 19th April and 1st June — *Title deeds.*—*Vendor and purchaser.*

If a vendor retains the title deeds, and covenants for further assurance only, the purchaser may, under that covenant, compel him to enter into a covenant for production of the deeds.

THE bill stated indentures of lease and release, dated the 3d and 4th of November 1818, by which, in consideration of 170*l.* the defendant conveyed to the plaintiff a piece of freehold land, and covenanted, with the plaintiff, for further assurance, in the usual manner; namely, that he, the defendant, and his heirs, and all persons lawfully claiming or to claim by, from, under or in trust for him or them, should and would, from time to time, and at all times thereafter, upon every reasonable request, and at the costs and charges of the plaintiff, his heirs, executors or administrators, make, do and execute, or cause and procure to be made, done and executed, all such further and other acts, deeds and assurances in the law, for more satisfactorily assuring and confirming the said premises thereby released and conveyed unto and to the use of the plaintiff, \*his heirs and assigns for ever, as by the plaintiff, his heirs [\*534] or assigns, or his or their counsel in the law should reasonably be devised, or advised and required.

The bill then stated that this piece of land had formed part of a larger estate belonging to the defendant; that no title deeds relating to it were ever delivered to the plaintiff, nor was any express covenant entered into for the production of them: that the plaintiff had since sold the piece of land, and was advised that he could not make a good or marketable title to it without first procuring a covenant from the defendant for the production of the title deeds; but that the defendant had refused to produce them, or to enter into a covenant for that purpose.

The bill prayed that the defendant might be compelled to produce, or to execute a covenant to produce the title deeds in question, in order that the

ruled. When a plea is allowed to stand for an answer, it is determined that it contains matter which if put in the form of an answer, would have constituted a valid defence to some material part of the matters to which it is pleaded as a bar, but that it is not a full defence to the whole matter which it professes to cover, or that it is informally pleaded, or is improperly offered as a defence by way of plea, or that it is not properly supported by answer. If a simple plea to the whole bill unaccompanied by an answer, is allowed to stand for an answer, without reserving to the complainant the right to except, it is to be deemed a sufficient answer, though not necessarily a full and perfect defence to the whole bill. But if the plea is ordered to stand for an answer, with liberty to except, or is accompanied by an answer, which will enable the complainant to except without such special leave, the master upon a reference of the exceptions must inquire and ascertain whether the bill is fully answered, taking the plea as a part of that answer; unless the court in permitting the plea to stand for an answer, as in the case of *Kirby v. Taylor*, 6 John. Ch. Rep. 254, declares as to what part of the bill it is a good defence. The court however sometimes prohibits the complainant, from calling, upon the defendant, by exceptions to discover particular matters, as to which he is not legally bound to answer." *Orcutt v. Orms*, 3 Paige, 459. See further *Goodrich v. Pendleton*, 3 Johns. Ch. Rep. 394 *Souzer v. De Meyer*, 2 Paige, 574. *Leecraft v. Dempsey*, 4 Paige, 124.

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plaintiff might be enabled to make a good and marketable title to the land, the plaintiff being willing to pay all reasonable costs and charges for the same.

The defendant put in a general demurrer.

Mr. *K. Parker*, for the demurrer, insisted that the plaintiff had made no case for equitable relief, and had not even stated that the defendant had the title deeds in his possession.

Mr. *Stephenson*, for the bill, insisted that, under the covenant for further assurance, the plaintiff had a right to call upon him to execute a covenant to produce the title deeds, as being a further assurance.

[\*535] \*The Vice-Chancellor seemed inclined to think that the case made by the bill was not sufficient; but ordered the demurrer to stand for judgment.

The VICE-CHANCELLOR:—I do not think that there has been a judicial decision upon the particular point, whether, under a covenant for further assurance in a conveyance, a new deed of covenant to produce title deeds may be required. But, whatever doubt there may be upon that point, this bill, stating that the plaintiff has re-sold the property, prays, alternatively, either a new deed of covenant to produce, or the actual production of the title deeds, to enable the plaintiff to show a marketable title upon his re-sale. The defendant's title deeds, being the root of the plaintiff's title, and, in that sense, a sort of common property,<sup>(a)</sup> I strongly incline to think that the plaintiff has an equity to that extent; and I am informed that the Lord Chancellor has expressed an opinion to that effect.

Demurrer overruled.

[\*536]

\*DARTHEZ V. WINTER.

1826, 26th April.—*Debtor and creditor.—Executor.—Trust.*

A debtor to a testator cannot maintain a bill against the personal representative, to obtain the directions of the court as to the disposal of the money due by him, and to restrain an action, brought by the personal representative, to recover the debt, on the ground that the debt had been appropriated by the testator for a particular purpose, and that the personal representative intended to apply it for purposes not warranted by the will.

In January, 1819, Francis de Rioboo, late of Lima, deceased, remitted 20,000 dollars to the plaintiffs, who were merchants residing in London, and, at the same time, wrote a letter, in which, after advising them of his having remitted the 20,000 dollars, he desired them, on the arrival of the dollars, to effect their sale at 5s. or upwards, without waiting for any rise in the price; and, as soon as sold, to invest the proceeds at interest on good security.

The dollars were duly received by the plaintiffs, and were afterwards sold by them for 4,007*l.* 14*s.* 2*d.*

Rioboo died shortly after the dollars were remitted to the plaintiffs, having

(a) *Barclay v. Ruine*, ante, vol. 1, 449.

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made his will, dated the 15th of June, 1819. But the particulars of his will were not known by the plaintiffs until long after the two letters after mentioned had been received by them. The only part of the will which related to the dollars was as follows: "I also declare that I have remitted to Europe a sum of 40,000 hard dollars, in specie, for the purpose of being laid out at interest, in convenient securities; which transaction is a thing well known to my testamentary executors, and which I require to be considered part of my property and effects: and it is my desire that the said sum of 40,000 dollars do remain placed at interest as I have determined, until my children shall have attained the age of majority, forbidding, as I do hereby expressly forbid, that the said 40,000 dollars be \*in other manner disposed of so [\*537] long as my said children shall not have so attained the age of majority; and that the interest annually produced by the said sum be added to the capital to bear interest, so that the whole, being united, may form one capital only for producing interest: and I order and direct that my executors do annually demand, of and from the appointed attorneys, an account of the transaction, for the purpose of observing and fulfilling all the clauses contained in this my testament. I, in the first place, name and appoint as my executors my wife Dona Ysabel Dominguez jointly with Don Juan Francisco Clarick, whom, as hereinabove mentioned, I appoint, by himself only, as depository and administrator of all the property and effects which I shall leave behind me at my death; and, on default of him, to each of the other executors in their respective succession; provided that it be perfectly legal, and that it do not clash with my dispositions contained in this testament; in the second place, Don Francisco Menendez; in the third place, Don Julian Parga; and, in the fourth place, Don Francisco Marino, with this express declaration, that each of the said named executors shall, in his regular turn, order and place, do and execute the functions committed to his charge, each of them however jointly, in his respective succession and place, with my said wife; and that the latter, jointly with them in the first place named executors, be considered as having the entire and absolute management of the executorship; and that it be understood that the joint community of management do pass, on default of Don Juan Francisco Clarick, to Don Francisco Menendez; on default of this latter, to Don Julian Parga; and, in default of them all, upon Don Francisco Marino: but, in the event of the death of my said wife, it is my will and desire that each \*of the persons named as my executors in community with [\*538] her, do then succeed and come in by himself for the executorship; but that, in such a case the trusteeship and guardianship of my minor children do devolve to Don Francisco Marino, named in the fourth place as my executor, conferring upon them, all and each of them, in their regular order, succession and place, full power and authority, whenever her death takes place, to assume and enter into possession of my property, and to dispose thereof in the most expedient manner in conformity with my will and desire, as expressed respecting the same, to pay, fulfil and observe all the several items and



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dispositions which I commit to their charge; and that the duration of their said functions be for one legal year, and for any longer time, as may be necessary, for which purpose I do prolong the said term."

By the 40,000 dollars mentioned in the will, were meant the dollars remitted to the plaintiffs, and some others which had been remitted, in like manner, to some other merchants in London.

In December 1819, F. A. Zavala, who had recommended Rioboo to remit the dollars to the plaintiffs, wrote to them the following letter:—"Lima, 20th December 1819. Dear Sirs,—Mr. F. Rioboo, deceased, particularly requested of me that I should take care of the destination of net proceeds of 20,000 dollars which he remitted to you; and, it being his wish that they may be left in your hands, producing an interest, until the minors be in age to dispose of them to their advantage, in future you will be pleased to follow on the same the directions of his executors, his widow and Don J. F. Clarick. I am, dear sirs, F. A. Zavala."

[\*539] \*And J. F. Clarick, about the same time, wrote and sent to the plaintiffs the following letter:—"Dear Sirs,—Mr. F. Rioboo, having died, left to my care, as first executor conjointly with his widow, Dona Ysabel Dominguez, all his property; in consequence of which, and of his having recommended particularly to Don F. A. Zavala the management and directions of the net proceeds of the 20,000 dollars which he remitted to you on board his majesty's ship Blossom, and, it being his wish that they might remain in your hands at interest till the minors, to whom they belong, be enabled to dispose of them, meanwhile you will be pleased to communicate on this matter with me. I take note of their proceeds reduced, and that they are invested at an interest according to the order of the said deceased F. Rioboo; and I hope that you will continue giving me your advices as to their production. It is convenient that you should not say how or by which way you became possessed of the said sums, as it is to be inserted in the inventory. The inclosed letter is from our Don F. A. Zavala, who confirms what I have said before. I am, dear sirs, J. F. Clarick."

No further application was made to the plaintiffs respecting the dollars, or their proceeds, till the time after mentioned.

About the 6th of July 1825, limited letters of administration of the goods and chattels of F. de Rioboo were granted, by the prerogative court of the archbishop of Canterbury, to the defendant Samuel Winter. Under these letters of administration, Winter commenced an action against the plaintiffs, in the court of king's bench, for the recovery of the proceeds of the

[\*540] \*dollars and interest. In order to show his title to receive the proceeds of the dollars, and the purposes to which they were intended to be applied, he produced to the plaintiffs copies of certain proceedings in a court of justice in Lima, consisting (amongst others) of a memorial or petition presented to that court by J. F. Clarick, in which, after stating a balance of 43,756 dollars, 5 reals, and 6-8ths, to be due to him from the testator's estate,

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upon his account as executor of the testator's will, for moneys expended by him in the maintenance, education and clothing of the widow and children, he prayed the court to appropriate and allow him, in payment of the balance in his favor, the 40,000 dollars then in the hands of the mercantile houses in London, setting aside the prohibition made by the testator in his will as above stated. And he also produced a copy of the decree of the court, made upon the petition, as follows: "Lima, the 10th September, 1824. Having seen the preceding acts, containing the exposition made by the widow of the late Don Francisco Rioboo as executrix, guardian and trustee of her minor children, and those of the counsel and general defender of minors, and taking into consideration that the political events of the time, and the present state of war, which have accrued since the epoch when the testator made his will and testament, and have paralyzed, and even nearly ruined, the considerable funds and property appertaining to the estate and executorship, that the same have hardly produced sufficiency for the support of the widow and her minor children, to which the co-executor himself has in some measure contributed, and thereby, in some measure, has been occasioned the balance presented by the account exhibited by him and approved of on the part \*of the parties [\*541] concerned; the court does pronounce and decide that, out of and from the capital existing in London, there be paid to the said executor, in part payment of his balance, the sum of 12,000 dollars, thus far setting aside the prohibition made in that respect by the deceased testator, in clause 24 of his will and testament."

The bill, after stating as above, alleged that it appearing, from the proceedings in the court at Lima, that the balance claimed to be due to the executor consisted, in part, of disbursements to which the 40,000 dollars mentioned in the will were not thereby made liable, and which were also in some respects improper; and that there was an intention to apply the proceeds of the dollars, or some part thereof, to purposes in derogation of, or inconsistent with the will, the proceeds of the dollars, if paid to the defendant, would be applied contrary to the directions of the will in regard to the 40,000 dollars, and that, in fact, the defendant and the executor intended so to apply those proceeds, when received; and that, under these circumstances, the plaintiffs were doubtful whether they had not been constituted trustees of the proceeds for the benefit of the children of the testator, and whether the court at Lima had competent jurisdiction to make the decree, and thereby to set aside the testator's will to the extent aforesaid; and whether the state of the testator's assets required the application of the proceeds of the dollars, or any part thereof, to payment of the demand of his executor; and whether, from the tenor of the letter of the executor, J. F. Clarick, to the plaintiffs, he had not some intention to appropriate the whole of the proceeds to his own use, or otherwise to misapply the same; and \*whether the defendant, under the limited [\*542] letters of administration and the powers aforesaid, was fully authorized to receive those proceeds; and, therefore, the plaintiffs were advised that

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they could not safely pay the proceeds, or otherwise dispose thereof, without the direction and indemnity of the court. The bill further stated that the executors of F. de Rioboo, and all his children, were resident in South America. It prayed that it might be declared, by the court, in what manner the proceeds of the 20,000 dollars, and the interest thereof, ought to be applied, the plaintiffs being willing to pay and dispose of the same accordingly; and that Winter might be restrained from further proceeding in his action at law.

The defendant Winter demurred, generally, to the bill.

Mr. *Hart*, and Mr. *Hull*, in support of the demurrer:—This is a bill of interpleader with one defendant only.[1] There is no case in which it has been held that a debtor can come into this court, admitting that he is a debtor, and alleging as a reason for seeking the protection of the court, that some person has persuaded him that, if he pays the debt to his creditor's personal representative, he will hereafter be damnified. There is no case in which this court prevents the personal representative from recovering a debt, because there is an outstanding equity.

Mr. *Sugden*, and Mr. *Sidebottom*, in support of the bill:—A testator may appropriate part of his personal estate for the benefit of certain parties. [\*543] This fund was appropriated by the testator in his lifetime, and by the executors after his death. The defendants do not claim in the character of executors the whole fund, but only 20,000 dollars of it; and, the purpose for which it is intended to apply them is in direct violation of the will.

The VICE-CHANCELLOR:—It is not disputed that the property in the hands of the plaintiffs is vested in the defendant, as representing the executrix and executor in Lima: but it is suggested that the executrix and executor have a purpose to apply it in a manner not warranted by the will of the testator. In this alleged misapplication the plaintiffs have no interest: and this court cannot, at their request, take upon itself the administration of the testator's estate.—Let the demurrer be allowed.

[\*544]

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1826, 26th April; 30th May; 1st and 27th June.—*Devise.—Revocation.*

Testator devised his estates at S. and H. to trustees, in trust, if there should be only one son of D. who should attain twenty-one, for that son, and in case there should be two or more such sons, in trust for the second of them, and gave all the residue of his estates to trustees, in trust to sell. He afterwards drew his pen through the trust to sell, and, by a codicil, declared that he intended to erase the direction to sell only: he then gave all his estates to the son of D. who should first attain twenty-one, and change his name to E. D. at the death of the testator had

[1] A bill of interpleader cannot be maintained by any person who does not admit a title in two claimants, and does not also shew two claimants in existence capable of interpleading; 2 Story's Eq. 124.

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a son who was still an infant, and afterwards had another son. Held, that the codicil revoked the devise of the S. and H. estates, and also the devise of the residue of the estates to the trustees; and that D.'s eldest son took under this codicil an immediate vested interest, in both the estates of which the testator was seised at the date of his will and those he purchased afterwards, and consequently was entitled to the rents during his infancy.

At the hearing of this cause the Vice-Chancellor directed a case to be stated, for the opinion of the judges of the court of king's bench,<sup>(a)</sup> upon six questions as to the construction and effect of the will and codicil of the late George Elwes, esquire, the father of the plaintiff, Mrs. Duffield.

That case was argued at the sittings after Easter term, 1825, and the judges afterwards certified their opinions to this court. When the case was argued, Mr. and Mrs. Duffield had only one son, but they had afterwards a second son born; and a supplemental bill was filed against him. The cause now came on to be heard for further directions.

Mr. Sugden, and Mr. Longley, for the plaintiffs, Mr. and Mrs. Duffield:—The certificate, as to the fifth and sixth questions, cannot be maintained. It is quite clear, when the nature of the trusts is considered, that the testator could not mean to give either the Southwood and Haverhill, or the \*Withersfield estates, to the trustees during the period from his [\*545] own death until a son of Mr. and Mrs. Duffield should attain the age of twenty-one years.

The testator could not mean those estates to be sold for that period. The amount of the surplus rents would vary according to the demands upon them for maintenance; and, therefore, nobody could purchase them. It is quite clear that the devisee cannot claim these surplus rents, as he is to take nothing until he attains twenty-one. The consequence is, that Mrs. Duffield is entitled to them, as part of the testator's real estate which is undisposed of.

Next, the intermediate rents of the Withersfield estate are not affected, either by the will or codicil, singly, or by both of them, jointly. Not by the will, singly; for the testator was not seised of that estate at the date of his will: not by the codicil, singly; for the devise in it is clearly an executory one. *Stephens v. Stephens*,<sup>(b)</sup> *Hopkins v. Hopkins*,<sup>(c)</sup> *Bullock v. Stones*,<sup>(d)</sup> in which case Lord Hardwicke, C. considered it quite clear that the intermediate rents would have gone to the heir, if the testator had not directed the devisee to be brought up. *Grant's case*,<sup>(e)</sup> *Bate v. Amherst*,<sup>(f)</sup> *Snow v. Tucker*,<sup>(g)</sup> *Fearne's Essay*, 400, and *Posth. Works*, 191. If then the devise in the codicil be executory, the devisee cannot be entitled to the intermediate rents, as he is to take no interest in the estates, the subject of the devise, before he attains twenty-one, and changes his name to Elwes.

\*The cases in which the devisee takes a vested interest in the rents [\*546] and profits, are either where he is a certain known and assignable per-

(a) For the report of this case, see 3 Barn. & Cress. 705.

(b) Ca. Temp. Talb. 228.

(c) Ibid. 44.

(d) 2 Vez. 521.

(e) 2 Leon. 36, and 10 Co. 50, a.

(f) Sir T. Raymond, 83.

(g) 1 Sid. 153.

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son, and must have the estate if he attain twenty-one; or where the estate is given over in case of his death under twenty-one. There is no case in the books, where there is not a devise over, that the intermediate rents, go to the executory devisee. The decision in *Boraston's case*(h) turned upon the adverbs of time, and the devisee was expressly pointed out by name. One or both of the circumstances above mentioned occurred in *Bromfield v. Crowder*,(i) *Edwards v. Hammond*,(j) *Goodtitle v. Whitby*,(k) *Doe v. Lea*,(l) *Doe v. More*,(m) *Doe v. Nowell*,(n) and *Warter v. Hutchinson*,(o) in which last case there was a present devise of a chattel interest to trustees until John Warter came of age. In the present case a double qualification is required; not only that the devisee should attain twenty-one, but that he should also take the name of Elwes; and there is no devise over.

Lastly, the intermediate rents cannot be affected by the will and codicil jointly: for, if a testator assumes to dispose of an estate by a codicil, no devise in his will can be called in aid of that disposition. But the codicil does not confirm the will, generally, but only "except as is before excepted." And, although a codicil is in general a republication of the will, its operation will be limited if such appear to have been the testator's intention. *Countess* [\*547] *of Strathmore v. Bowes*,(p) *\*Drinkwater v. Falconer*,(q) *Crosbie v. MacDoual*,(r) *Holder v. Howell*,(s)

Mr. Hart, and Mr. Pemberton, for the defendant, George Thomas Warren Hastings Duffield, the eldest son:—The eldest son is as much interested as the heir at law is in contending that the certificate is wrong, so far as it gives the surplus and intermediate rents to the trustees. Then the question is, whether those rents are a resulting trust for the heir, or go to the person to whom the estate is devised. The courts strongly incline to hold that those rents go to the devisee. All the authorities upon the subject were before the court in the case of *Warter v. Hutchinson*, and are referred to in the arguments, in the court of king's bench, of the case stated in this cause for the opinion of that court.

Mr. Horne, and Mr. Newland, appeared for the testator's widow, who had no interest in the rents in question.

Mr. West, for the daughters of Mr. and Mrs. Duffield:—The devise in the codicil is executory. There is no case where a gift, made upon a double contingency, has been held to create a vested estate. There is a difference between a devise to take effect upon an event which must take effect if the devisee lives, and one which may not take effect at all, such as marriage. *Atkins v. Hiccocks*,(t) As the testator directed the \*rents of the estates devised to his son to be applied by the trustees for his

(h) 3 Co. 19, a. (i) 1 N. R. 313. (j) 2 Show. 398; S. C. 3 Lev. 132, and 1 N. R. 324, in note

(k) 1 Burr. 228.

(l) 3 T. R. 41.

(m) 14 East, 601.

(n) 1 M. & S. 327; and see *Randoll v. Doe*, 5 Dow. 203.

(o) 1 B. & C. 721.

(p) 7 T. R. 482, and 2 Bos. & Pul. 500.

(q) 2 Ves. 626.

(r) 4 Ves. 610.

(s) 8 Ves. 97.

(t) 1 Atk. 500.

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maintenance, it is evident that he did not intend those rents to go to the son. The codicil was a republication of the will, so as to make the intermediate rents of the Withersfield estate pass by it. *Doe v. Meredith*, (v) *Pigott v. Waller*, (w) *Hulme v. Heygate*. (x)

*Mr. Pemberton*, in reply :—The court of king's bench has held that, under the devise in the codicil, both the estates which the testator was seised of at the date of his will, and those which he purchased afterwards, passed to the eldest son ; but that, as to both classes of estates, the intermediate rents went to the trustees. It is impossible to maintain this opinion. It may be questioned whether the codicil was not a revocation of the devise to the trustees of the estates which the testator was seised of at the date of his will ; for by the codicil he makes an express devise of all his estates, which is inconsistent with the devise in his will. The erasure was, in point of fact, more extensive than the testator intended it to be, as it covered a direction to get in the outstanding personal estate. This accounts for the necessity of making the introductory declaration in the codicil, as to the erasure. The testator intended the erasure to extend to his real estates only, and not to his personal estate ; and the reason why he did not strike out the devise to the trustees altogether was, that he could not do so without striking out that part which related to the personal estate. The purposes for which the real estates were devised to the trustees were to sell and pay \*debts, &c. By the codicil, [\*549] he says that he does not mean his real estates to be sold, but to go to the eldest son of Mrs. Duffield. It would be singular, then, to hold that the testator meant the devise to the trustees to remain, when the purposes for which that devise was made were revoked by the codicil. At all events, if that devise was not revoked, the trustees hold the estates for the persons to whom they are given by the codicil.

It was said, by the counsel for the plaintiffs, that all the decisions in which the devisee was held to take an immediate vested interest depended upon the adverbs of time, "when, then, until," &c. being used. But this is contrary to the fact. Those adverbs did not occur in the cases of *Edwards v. Hammond*, (which was the first case that was decided after *Boraston's case*,) *Bromfield v. Crowder*, *Spring v. Casar*, (y) or *Doe v. Nowell*. In this last case there was nothing given to any person then in *esse*, but only to a person who should answer a particular description at a particular period. *Snow v. Tucker* does not support the position for which it was cited. *Grant's case* (z) does not apply. There Grant devised to his wife for life, and when J. G. came to his age of twenty-five years, then that he should have the land in fee. J. G. levied a fine of the land to A. B. before he attained twenty-five, and afterwards attained twenty-five, and then died ; and it was held that his heir was barred by the fine. Now it is obvious that this decision proceeded not on the ground that Grant did not take, but that he did take a vested interest in the land.

(v) 2 M. & S. 5. (w) 7 Ves. 98. (x) 1 Mer. 185. (y) 1 Roll's Ab. 415.  
(z) Reported Cro. Eliz. 122, by the name of *Johnson v. Gabriel and Bellamy*.

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[\*550] \*Mr. Fearn's opinion that has been referred to, is directly contradicted by the subsequent authorities. It rests upon the ground that the devise is immediate, and not in remainder, and that there is no intermediate disposition of the rents until the period arrives when the estate is to vest in possession. This is contrary to *Bromfield v. Crowder*, *Doe v. Nowell*, and *Doe v. Moore*, where Lord Ellenborough, C. J. expressly says that those circumstances make no difference.

Then with respect to the argument founded on there being a devise over. It is said that such a devise has been found in every case where the devisee was held to take an immediate vested interest. If a testator intends an estate to go over if a particular event does not happen, he must express to whom it is to go, unless he intends the heir to take it. But unless the devise over is to the heir, so as to show, by implication, that the heir is not to take sooner, what possible difference can it make? But in fact the authorities do not warrant the assertion. In the very first case that introduced the law, *Boraston's case*, there was no devise over. Nor was there any such devise in *Edwards v. Hammond*, *Spring v. Caesar*, *Goodtitle v. Whitby*, *Manfield v. Dugard*, (a) or in *Doe v. Lea*. (b) Many other cases are collected by Mr. Fearn, (c) and it is remarkable that he never once refers to the circumstance of a devise over as material either way; nor is it relied on in any of the judgments in the cases referred to, although it is in some of the arguments. But suppose [\*551] that circumstance were of any weight, it might be fairly said \*to occur in this case; for what real distinction is there between a devise to the first son who attains twenty-one and takes the name of Elwes, and one to the eldest son, and if he did not attain that age and take the name, then to the second son?

It is next said that there is a distinction between a devise which is to take effect upon an event which must happen if the devisee lives, on his attaining the age of twenty-one, and one upon an event which may not happen, as his taking a particular name; and for this *Atkins v. Hiccocks* was cited, which was a bequest to a daughter when she should marry. Now an event must be either certain or contingent. *Driver v. Frank*. (d) It cannot be more or less contingent, though it may be more or less probable. The rule is to collect the intention of the testator by looking at the whole will. Now is the direction, that the devisee shall take the testator's name, sufficient to make the court conclude that the testator did not intend him to take an immediate interest, when every other provision in the will is in favor of such intention? His taking the name if he does attain twenty-one, is much more probable than his living to be twenty-one at all. The case referred to, and all the reasoning, proceed solely on principles applicable to personal estate. The construction of a will, with respect to real estate, is directly opposed to the construction as to personal estate. *Doe v. Moore*; *Hanson v. Graham*. (e) However, if At-

(a) 1 Eq. Ab. 195.

(b) 3 T. R. 41.

(c) See Cont. Rem. 241, et seq.

(d) 3 M. &amp; S. 25.

(e) 6 Ves. 239.

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*kings v. Hiccocks* had related to real estate, neither the decision, nor the reasoning on which it was founded, would have applied; \*for it [\*552] proceeded on the maxim, "*dies incertus conditionem facit*." The legacy was not given at a particular time, if the legatee should marry; but when she should marry with the consent of her brothers. Here there is no uncertainty as to the time. The changing the name is as fixed in point of time as the attaining twenty-one. As soon as the grandson attains twenty-one he is to take the name. This was the main ground for holding the estate vested in *Spring v. Caesar*. The payment or non-payment of the money was contingent, but a time was fixed for the payment to be made. In *Atkins v. Hiccocks* nothing could be more uncertain than the event, or the time at which it was to take place. It did not depend upon the legatee. It was uncertain when she would marry, whether she ever would have an opportunity of marrying, or whether she could obtain the consent of her brothers if she did marry. The taking the testator's name is in fact no contingency. It is merely an obligation which he imposes on the person who is the object of his bounty.

The Vice-Chancellor, at the conclusion of the reply, observed that the second son had a material interest in the surplus rents of the Southwood Park estate, and desired that some counsel might be instructed to appear for him.

1st June.—Accordingly, on this day, Mr. *Ross* appeared for the second son, and contended that the second son was entitled to the surplus rents; for as soon as he was born he took a vested interest. *Bromfield v. Crowder*, (f) *Doe v. Moore*, *Doe v. Nowell*, and the observations of Dampier, J. in *Driver v. Frank*.

\*The VICE-CHANCELLOR :—The judges of the king's bench have [\*553] certified their opinion that the surplus rents and profits of the freehold and copyhold estates at Southwood, and of the freehold farm at Haverhill, devised by the will, after providing for the maintenance of the devisee thereof, belong, at law, to the surviving trustee; and this opinion cannot be questioned, since the trustees, in order to provide for such maintenance, must necessarily be in the receipt of the rents and profits. The question who is equitably entitled to such surplus rents and profits remains for the consideration of this court.

The devise in question is, in case there shall be but one son of Mr. and Mrs. Duffield who shall attain the age of twenty-one years, upon trust for such son, his heirs and assigns for ever: and, in case there shall be two or more sons of Mr. and Mrs. Duffield who shall attain the age of twenty-one years, then in trust for the second of such sons, his heirs and assigns for ever. At the death of the testator, Mr. and Mrs. Duffield had only one son, and four daughters; the question is, whether the only son then took a present vested interest, subject to be divested by his death before twenty-one, or by the birth of another son, or whether the estate was to remain in contingency till there was no



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possibility of another son, or until a second son attained twenty-one. In *Bromfield v. Crowder*, and the well known cases of that class, the estate, which was held to be vested, was to belong to another person upon one event only, namely, the death of the taker before he attained twenty-one. But here there were two events, by either of which the estate was to belong to [\*554] another person, namely, by the death of the only son before he attained twenty-one, or by the birth of another son; and so far this case appears to be new in circumstance. This doctrine of estates vesting subject to be divested upon a subsequent event, is not confined to cases where the subsequent event is that the party attains twenty-one. In *Spring v. Caesar*, in Roll's Abridgment, which was cited in the argument, a fine was levied to the use of A. and his heirs, if B. did not pay him 20s. on the 10th of September, and if B. did pay it accordingly, then to the use of A. for life, remainder to B. and his heirs, and it was held that A. took a vested fee, subject to be divested by B.'s subsequent payment. As the same doctrine is to be applied, therefore, where the subsequent event is other than the taker's death before twenty-one, it is difficult to find a principle why another event for divesting the estate may not be superadded to the event of the taker's death before twenty-one. And I consider the present case, as to these surplus rents, to be, in effect, decided by *Bromfield v. Crowder*, and that class of cases, and that here the only son, at the death of the testator, took a vested interest, subject to be divested by his death before twenty-one, or by the birth of another son. Another son has since been born, and the estate of the only son is now divested, subject however to be revested if no other son should attain twenty-one. The judges of the king's bench have certified that the estates purchased after the will pass by the codicil to the first son of Mrs. Duffield who shall attain twenty-one and change his name to Elwes. They subsequently certify that the intermediate rents and profits of the testator's real estates, which are devised by the codicil to the first son of Mrs. Duffield who shall attain twenty-one and change his name to Elwes, until such events take place, shall [\*555] belong to \*A. Chambers, the surviving trustee under the will. There appears some inaccuracy of expression here. If it be meant that the after-purchased estates pass by the codicil, inasmuch as the codicil operates as a republication of the will, then it would seem more accurate to say that those estates pass by the will. If they do not pass in consequence of the republication of the will, but by the force of the codicil alone, then such rents and profits cannot belong to the surviving trustee under the will. By the will, the residuary freehold estates of the testator are given, with all his residuary property, to trustees, to be sold, and the produce of the sale is directed to be applied in the manner therein stated. By the pen-lines drawn through this part of the will, and by the codicil, the power of sale of the freehold, which is given by the will to the trustees is expressly revoked: and, by the codicil, the testator makes a new disposition of all his freehold property, lands, tenements and hereditaments, to the first son of his daughter who shall attain twenty-one and

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change his name to Elwes. And this new disposition, being totally inconsistent with all the trusts of the will as to the freehold, it appears to me that the better decision is, that the codicil wholly revokes the devise in the will of the freehold estate to the trustees, and that the first son of Mrs. Duffield who shall attain twenty-one, and change his name to Elwes, takes not an equitable estate through the trustees named in the will, but a legal estate, by force of the codicil alone; and consequently the intermediate rents and profits of the freehold estates, if they pass by the codicil only, cannot belong to the surviving trustee under the will. Whether, however, this son takes a legal or an equitable estate in the freehold, the \*question, as to the beneficial inter- [\*556] rest in the intermediate rents and profits, will be the same. Here the testator directs that the son of Mrs. Duffield who shall first attain twenty-one, shall, on attaining such age, change his name to that of Elwes, and then the devise is to the said son of his daughter, on his attaining his age of twenty-one and changing his name to Elwes. If the devise had been to the son of Mrs. Duffield who shall first attain twenty-one, without more, there could be no question that the only son would take a vested interest, subject to be divested by his death before twenty-one; and I am of opinion that the additional words as to changing his name made no difference. If words of condition, they are, necessarily, words of condition subsequent; but, there being no devise over, they are rather to be considered as words of recommendation.

Let it be declared, therefore, that not the surviving trustee under the will, according to the opinion of the king's bench, but the eldest son of Mrs. Duffield, is now entitled to the rents of the estates devised by the codicil to the son of Mrs. Duffield who shall first attain the age of twenty-one years and change his name to Elwes; with liberty to any party interested to apply in case of his death before twenty-one.

## \*SMITH v. NELSON.

[\*557]

1826, 25th February, and 5th May.—*Vendor and purchaser—Costs.*

A purchaser under a decree is entitled to the costs where the master reports against the title, although there is no fund in court.

UPON a sale under a decree, the usual reference of title was made to the master. He reported against the title. The purchaser now moved for the costs of the reference, there being no fund in court.

Mr. Tinney, for the purchaser, cited *Reynolds v. Blake*.(a)

Mr. Treslove, contra, cited *Lechmere v. Brasier*.(b)

The case stood over for inquiry into the practice.

The Vice-Chancellor stated that it appeared that the cases were not uni-

(a) *Ante*, 117.

(b) 2 Jac. &amp; Walk. 287.

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form; and that it was not consistent with principle, that the right of the purchaser to be indemnified for expenses improperly occasioned to him by the suit, should depend upon the circumstance whether there did or not happen to be funds in court at the time of the master's report; and he ordered the costs to be paid by the plaintiff to the purchaser, without prejudice to the question how such costs should ultimately be satisfied.

[\*558]

## \*OXENFORTH V. CAWKWELL.

1826, 26th April, and 3d May.—*Devise.—Copyhold.*

Devise of "all my freehold and copyhold messuages, &c. the copyhold parts thereof having been duly surrendered to the uses of this my will," passes unsurrendered, as well as surrendered copyholds.

A TESTATOR who was seised of certain copyhold estates, part of which he had surrendered to the use of his will, and other part of which he had not so surrendered, devised as follows: "And as to all and every of my freehold, copyhold and leasehold messuages, lands, tenements and hereditments, whatsoever and wheresoever situate, not hereinbefore given, devised or bequeathed, the copyhold parts thereof having been duly surrendered to the uses of this my will, I give, devise and bequeath the same unto my nephews, W. C. and E. O. their heirs, executors, administrators and assigns, according to the nature and quality thereof, respectively, in equal shares."

The question was, whether the unsurrendered copyhold passed under this devise to the two nephews.

Mr. *Horne*, and Mr. *Pemberton*, for the plaintiff, contended that it did not pass, and cited *Gascoigne v. Barker*; (a) *Wilson v. Mount*; (b) *Blunt v. Clithrow*. (c)

Mr. *Hart*, and Mr. *Wakefield*, for the defendant, relied on *Banks v. Denshaw*; (d) *Rumbold v. Rumbold*; (e) *Strutt v. Finch*. (f)

[\*559] \*THE VICE-CHANCELLOR:—The single question is, whether the expressions used by the testator manifest an intention that all his copyholds should pass, or that such of his copyholds only should pass as he had surrendered to the use of his will. The expression, "the copyhold parts thereof having been duly surrendered to the uses of this my will," considered in its natural sense, simply affirms that he had surrendered to the use of his will all the copyhold part of his gift, namely, "all his copyhold lands, tenements and hereditaments, whatsoever and wheresoever situate, not thereinbefore devised;" and because he happened to be in one particular mistaken in the fact affirmed by him, I cannot therefore assume that he had an intention

(a) 3 Atk. 8.

(d) 3 Atk. 585, and 1 Ves. 63.

(b) 3 Ves. 191.

(e) 3 Ves. 65.

(c) 10 Ves. 589.

(f) Ante, 299.

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which is neither warranted by the particular expression relied upon, nor reconcilable to the other parts of the will.

I agree that there is a great resemblance between this case and the case of *Wilson v. Mount*; but there is a difference in the language, and the expression here used is less susceptible of a restrictive sense. Lord Alvanley had great difficulty in coming to his conclusion in *Wilson v. Mount*, but considered himself as yielding to authority, and his decision has not given universal satisfaction. Applying to this case, as I must do, the general principles of construction, I am bound to declare that it was the intention of this testator that all his copyhold estates should pass.

\*WATKINS v. STONE.

[\*560]

1826, 31st May, and 12th July.—*Pleading.*

One of the defendants to a bill by tenants in tail for redemption of an estate, having put in a plea of a fine levied of part of the estate averring that the part included in the fine was the only part of the estate in which the defendant claimed any interest, and accompanied by an answer admitting the possession of title deeds, &c.: held, that the plea was overruled by the answer.

THE bill stated that, in 1755, Elizabeth and Letitia Hughes were seised in fee of certain real estates in the county of Monmouth, called Gelly Vawr, Gelly Vach, The Pant, and The Packhorse, subject to a mortgage in fee to one Robert Lucas, for securing 1,500*l.* and interest: that, in January, 1755, William Watkins, the plaintiff's grandfather, agreed to purchase this property for 2,480*l.* 10*s.*; and thereupon, by indentures of lease and release, dated the 27th and 29th of January, 1755, and made between E. and L. Hughes of the one part, and Watkins of the other part, the estates were conveyed to him in fee simple: that, by indentures of lease and release, dated the 24th and 25th of April, 1755, made between Watkins and Philadelphia his wife, of the first part, Ann Constable, who was described as sister-in-law of Philadelphia Watkins, of the second part, and Thomas Symons, of the third part, after reciting the purchase and conveyance to Watkins, and that 980*l.* 10*s.*, part of the purchase money, had been advanced by Ann Constable, upon condition that the estates should be settled to the uses after mentioned, the estates were conveyed by Watkins to Symons in fee, to the intent that Ann Constable should, subject to the mortgage for 1,500*l.*, receive a rent-charge of 30*l.* per annum, for her life, and, subject to the mortgage and rent-charge, to the use of Watkins and Philadelphia his wife, for their lives and the life of the survivor, with remainder to the use of the heirs of the body of Philadelphia by Watkins, with remainder to the use \*of the right heirs of Watkins: that, by [\*561] indentures dated the 6th and 7th of May, 1760, Watkins, in consideration of a release of the interest then due on the mortgage, and for other considerations therein mentioned, released and conveyed to Ann Constable

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and her heirs, all his interest in the property, subject to the estate and interest therein of Philadelphia Watkins and the heirs of her body: that Watkins died, many years ago, in the lifetime of Philadelphia his wife; and that Edward Watkins, her eldest son by him, died in 1816, in her lifetime, without issue: that John Watkins, the plaintiffs' father, her second son by William Watkins, also died in her lifetime, leaving the plaintiffs his only children and co-heirs at law: that Philadelphia Watkins died in January, 1823, leaving the plaintiffs the heirs of her body by Wm. Watkins, and, as such, entitled to the estates in question, subject only to what, if any thing, was due on the mortgage: that, by indentures of lease and release, dated the 23d and 24th of June, 1758, to which Wm. Watkins and Philadelphia his wife were named as parties, and which were duly executed by Wm. Watkins, after reciting that Ann Constable had paid 1,600*l.*, being all that was due for principal and interest on the mortgage, the whole of the mortgaged premises were conveyed to her in fee, subject to a proviso for redemption, on payment of the 1,600*l.* and interest, by Watkins and Philadelphia his wife, or either of them, or the heirs of either of them; and it was thereby provided that upon payment thereof A. Constable should re-convey the premises to the uses of the indentures of April, 1755; and they thereby covenanted for payment of the 1,600*l.* and interest accordingly: that Ann Constable had been long since dead: that, by [\*562] indentures dated the 14th and 15th of November, 1780, \*and expressed to be made between Philadelphia Watkins and Edward Watkins, her eldest son, and heir at law of Wm. Watkins by Philadelphia Watkins, of the first part, Sir Edward Williams and Edward Allen, the executors and devisees of Ann Constable, of the second part, and James Jenkins, of the third part, that part of the estates called Gelly Vaur were conveyed to James Jenkins in fee: that James Jenkins afterwards died intestate, and without issue, leaving John Jenkins his only brother and heir at law; but the plaintiffs were unable to discover who was his personal representative, or whether letters of administration of his estate were ever granted: that, by indentures dated the 6th and 7th of December, 1787, Gelly Vaur was conveyed by John Jenkins to Joseph Lewis, one of the defendants, in fee simple: that, by indentures, dated the 22d and 23d of November, 1819, some estate in Gelly Vaur was conveyed by way of mortgage to Wm. Jones, another of the defendants, by or by the direction of Joseph Lewis: that many years ago Sir Edward Williams and Edward Allen, as devisees and executors of Ann Constable, and Philadelphia Watkins and Edward Watkins, conveyed the remainder of the mortgaged estates to John Price, another of the defendants, in fee simple, who afterwards conveyed them to Edward Watkins, by way of mortgage, for securing 2,500*l.* and interest: that Edward Watkins by his will gave his personal estate (subject to some legacies,) and his securities for money, including the estates so mortgaged to him, to his niece, the defendant, Sarah Jenetta, the wife of the defendant, Martin William Lucas, and her heirs, executors and administrators, and appointed Richard Constable, John Constable, and

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Richard Owen Stone, executors of his will: that, by settlement previous to \*the marriage of Mr. and Mrs. Lucas, the mortgaged premises, and the money thereby secured, were conveyed to Richard Owen Stone and William Owen Stone, upon certain trusts for the benefit of M. W. Lucas and his wife, or one of them: that the several persons claiming by the instruments before mentioned, were, during the life of Philadelphia Watkins, in possession or receipt of the rents and profits of the premises comprised in the indentures of April, 1755, as mortgagees thereof, and which were much more than sufficient to keep down the interest of the mortgage money; and that the whole of the interest due on the mortgage to Robert Lucas had been fully paid by means of such rents and profits; that, therefore, the plaintiffs were entitled to have the estates re-conveyed to them on payment of what remained due on that mortgage, and to have an account of, and be paid the amount of the rents and profits accrued since the death of Philadelphia Watkins: that the defendants pretended that the estate tail, created by the indentures of the 24th and 25th of April, 1755, had been barred by a fine levied in Easter term, 18th Geo. 3d, or in Hilary term, 3d Geo. 4th, and that the equity of redemption had become vested in them; but the plaintiffs charged that such fine, if levied, was inoperative in barring the estate tail, Philadelphia Watkins not having been a party to it, and it having been levied by Edward Watkins alone, who died in his mother's lifetime, and never acquired any estate in the property in question: and, as to the fine alleged to have been levied in 3d Geo. 4th, that the estates were derived from William Watkins, the late husband of Philadelphia Watkins; and that, although Philadelphia Watkins was alleged to have levied such fine, yet that the plaintiffs, who then were the tenants in tail of the \*estates expectant [\*563] upon her death, were not parties to the fine, or consenting thereto, and, therefore, that the estate tail was not barred: that the indentures of the 24th and 25th of April, 1755, or the substance and effect thereof, were well known to the persons through whom the defendants derived title to the equity of redemption of the premises, and were recited or referred to in the deeds by which the equity of redemption was attempted to be conveyed; and that those deeds, and the indentures of April, 1755, were then in possession of the defendants: that the defendants had in their possession divers deeds, &c. relating to the estates, and whereby the truth of the matters aforesaid would appear.

The bill prayed for a re-conveyance of the estates by the defendants to the plaintiffs, and for an account, and payment to the plaintiffs of the rents arisen from the estates since the death of Philadelphia Watkins, and of what was due in respect of the mortgage-debts, after deducting the amount of the rents and profits what had been received, and were properly applicable in reduction or payment thereof, the plaintiffs offering to pay what should remain due in respect of such mortgage; and for delivery up of possession of the premises, and of all deeds, &c. in their power relating thereto.

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The defendant William Owen Stone, put in a plea to the whole of the bill, except such parts as sought a discovery of the purchase of the estates by William Watkins; of the execution of the deeds of the 24th and 25th of April 1755, and whether those deeds were in the possession of the defendant; as to the consideration of 980*l.* having been paid: as to the mortgage to [\*565] Ann \*Constable, by the indentures of the 24th and 25th of June 1758; as to all the estates comprised in the deeds of April 1755 having been derived from William Watkins; as to the substance and effect of those deeds having been known to the parties through whom the defendants derived their title, and having been recited in the deeds which conferred the defendant's title; as to the estate and interest which the defendant claimed in the premises; and as to the defendant having deeds, papers, &c. in his possession.

The plea was, that Philadelphia Watkins being seised in tail of the hereditaments and premises in the bill mentioned, and called The Pant, a fine *sur connissance de droit come ceo*, &c. was, in or as of Trinity term 1822, levied, in due form of law, before the justices of the court of common pleas at Westminster, between John Price, plaintiff, and the said Philadelphia Watkins, defendant, of the said hereditaments and premises called The Pant, by the description of three messuages, three gardens, three orchards, one hundred acres of land, fifty acres of meadow, fifty acres of pasture, five acres of wood, and twenty acres of furze and heath, with the appurtenances, in Llanvetherinc, and also one annual rent of 4*l.* 5*s.* 2*d.* issuing out of the tenements aforesaid, upon which fine proclamations were duly made according to the form of the statute in that case made and provided; and the defendant averred that the hereditaments and premises, called The Pant, of which such fine was levied as aforesaid, were the only part of the hereditaments and premises claimed by the bill in which he claimed any estate, title or interest; and that Ann Constable was the sister-in-law of Philadelphia Watkins, being the daughter of the father of [\*566] \*Philadelphia Watkins by another mother, and that the purchase of the hereditaments and premises, called The Pant, by Wm. Watkins, was agreed for and made by him with the approbation, and on the behalf of Ann Constable; and that she gave and advanced to Wm. Watkins the consideration money for the purchase thereof, upon condition that the hereditaments and premises should be settled and conveyed to the uses declared thereof by the indentures of the 24th and 25th of April 1755; and that those hereditaments and premises were settled and conveyed to such uses, in performance of the said condition; and under the circumstances aforesaid the defendant insisted that the hereditaments and premises, called The Pant, were derived from Ann Constable, and not from William Watkins; and he pleaded the matters aforesaid in bar, &c.

The plea was accompanied by an answer to those parts of the bill that were excepted in the plea.

Mr. Turner, for the plea:—This plea and answer will, probably, be objected to on the ground that too extensive a discovery has been given by the answer.

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But, as the bill contains a charge that the estates were derived from William Watkins, it was necessary to meet that charge by averment in the plea, and to support the averment by an answer. The legal interest in the estates did, in fact, pass from William Watkins; and the answer, therefore, could only contain a qualified denial of the estates having been derived from him, stating the circumstances under which they were so derived. The defence, therefore, was properly framed, by excepting out of the plea all such parts of the bill as referred to the derivation of the \*estates from William Wat- [\*567] kins. The question to be determined upon this record is, whether these estates can be held to have been of the inheritance, or purchase of William Watkins, so that it was not competent to his widow to bar the entail by fine in consequence of the proviso contained in the statute 32d H. 8th, c. 36. The object of that proviso was only to prevent women from alienating lands settled upon them by their husbands, not to control their power over lands derived from their own relations. *Eysten v. Studd.*(a) There have, indeed, been some cases where lands, which were the absolute property of some member of the husband's family, having been settled in consideration of marriage and of money paid by the wife's relations, the settlement has been held to be within the proviso in the statute. But those cases are distinguishable from the present. The husband there became a purchaser by the marriage. In this case, the settlement is post-nuptial; and the estates never were the absolute property of the husband. He held them only as trustee. The proviso in the statute does not even reach the case of a settlement of lands by a stranger. *Ward v. Wallhew.*(b) Without entering into a minute examination of the cases, it is sufficient to establish that these estates were not of the inheritance or purchase of the husband. They were not derived to him by descent, and he did not purchase them with his own moneys. As soon as the estates were conveyed to him, the trust resulted to Mrs. Constable, who might, at any time, have filed a bill to have the settlement executed.

\*Mr. Jacob, for the bill:—The plea is bad in form. The fine is [\*568] pleaded, not to the whole bill, but to a part, the other part being answered, and the answer admitting the deeds, &c. and facts stated in it. But, if the plea be good, it is an answer to that part as well as to the rest. Every plea, except a negative plea, admits the truth of what is stated in the bill. It cannot, therefore, be necessary to accompany it with an answer containing admissions. The office of an answer in support of a plea, is to deny charges in the bill, which, if true, would defeat the plea: any other answer overrules the plea, being unnecessary, and inconsistent with the principle on which the plea rests.

The bill, amongst other thing, calls on the defendant to set forth what claim he makes to the estates. If the plea be good, i. e. if the plaintiffs have no title, he is not bound to state his title: accordingly he pleads to this part of the

(a) Plowd. 463; 1 Inst. 366, a.

(b) Cro. Jac. 173.



bill. But he also answers it, stating that he claims to be a mortgagee. Here again the plea is overruled.

The plea is that a fine was levied of part of the estate, The Pant: and it states that, as to the other parts, the defendant claims no interest. This ought to have been pleaded separately, as a disclaimer. By inserting this disclaimer in the plea it is rendered double. It tenders two distinct issues, as to the different parts of the estate: with respect to one part, he declines answering, because the plaintiffs are, he says, barred by the fine: with respect to the other part, he declines answering for an entirely distinct reason, viz. because he claims an interest.

[\*569] \*This species of disclaimer, if it were good in form, would not afford a sufficient defence to that part of the bill which it applies to. An account of the rents and profits is sought. The defendant must, therefore, answer whether he has received the rents and profits of that part of the estate in which he disclaims all interest. If he has received them, he cannot disclaim the liability to account for them.

As to the merits, the fine was inoperative, if Philadelphia Watkins was, as we contend, tenant in tail, *ex provisione viri*, within the meaning of the statute, 11th Henry 7, c. 20. Now the land was purchased and settled by her husband: the 980*l.* 10*s.* paid on the purchase, was indeed advanced by the wife's sister; that did not, however, render her the owner of the estate; first, because part of the purchase money (1,500*l.*) remained on the mortgage; and the husband became personally liable (as between himself and the vendors) to pay that sum, or indemnify them against it. If the estate had fallen in value below 1,500*l.*, he must have made good the difference. His undertaking this liability was part of the consideration on which the vendors conveyed: thus the consideration for the purchase, moved partly from him, and partly from the wife's sister. It is also stated by the bill, and must therefore be taken as true, that he afterwards paid off part of the mortgage money; and, by the deed of the 24th of June 1758, he covenanted to pay it off, and to convey to the uses of the settlement.

Secondly, the 980*l.* 10*s.* is recited to have been lent or advanced to him by the wife's sister. It is not said that the purchase was made by him, as agent or trustee for her: but he bought, for himself, with borrowed money. [\*570] Hence, in the interval between the \*purchase and the settlement, he might have repaid the 980*l.* 10*s.* and have kept the estate. It was, therefore, his property during that time.

The cases establish that, when the consideration for the purchase of the settled lands moves partly from the wife's relations and partly from the husband or his relations, the case will be within the statute; and also that, when the settlement is made by the husband or his relations, the circumstances of it being partly in consideration of money derived from the wife's family, will not take it out of the statute. Thus, in *Piggot v. Pulmer*, (c) land was purchased

(c) Moore, 250; 14 Vin. Ab. 551, pl. 5.

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for 160*l.*, of which the wife's father paid 140*l.*: the settlement of this land was held to be *ex provisione viri*. In *Kirkman v. Thompson*,<sup>(d)</sup> the wife's father paid 200*l.* to the husband's father, and the latter, in consideration of that sum, and of the marriage, settled an estate on the husband and wife, and the heirs of the body of the wife: this was held to be within the statute. On the other hand, when the estate moves from the wife's relations, the circumstance of the husband having paid money which formed part of the consideration, has been held not to bring the case within the statute. *Copland v. Pyatt*,<sup>(e)</sup> and see *Jenk.* 319. pl. 20.<sup>(f)</sup> Thus it appears that the law has not regarded the payment of money by either party, but has held the estate to have been derived from the party by whom it was conveyed. Accordingly, it has been held that, if money produced by sale of the \*wife's estate, [\*571] be laid out in other land, and the husband settles the land so purchased, it will be within the statute.<sup>(g)</sup> Where the wife is a copyholder, and the husband purchases the freehold, and settles the estate, the statute applies; <sup>(h)</sup> the whole estate, excepting what has been paid for the enfranchisement, comes from the wife, but it is held to be derived from the husband, the purchase and settlement being *de facto* by him. In *Sympton v. Turner*<sup>(i)</sup> the wife joined the husband in barring a settlement under which she had a jointure of 400*l.* per annum, a new settlement being made under which she had a smaller jointure. The latter jointure was thus, in fact, purchased by the wife by the relinquishment of the former jointure: still, as it was actually settled by the husband, it was held to be within the statute. In this case the estate was purchased and settled by the husband; and therefore, though the consideration for the purchase partly moved from the wife's family, it must be regarded as an estate derived from the husband.

The VICE-CHANCELLOR:—The plaintiffs are issue of a marriage between William Watkins and Philadelphia his wife; and they claim as tenants in tail, under a post-nuptial settlement, made by the husband, of lands which he had purchased, and which were conveyed to him in fee. By this settlement an estate was limited to the husband and wife, for their natural lives and the life of the \*survivor, with remainder to the use of the heirs of the [\*572] body of the wife by the husband. It is recited in the settlement that the purchase of this estate was made by the husband, with the approbation of the sister-in-law of the wife, who had advanced to him the purchase money upon condition that the estate should be limited to the uses expressed in the settlement. The actual question in the cause is, whether the estate tail so limited to the wife, is the inheritance of the husband given to the wife, within the intention of the two statutes of the 11th Hen. 7th, c. 20, and the 32d.

<sup>(d)</sup> Cro. Jac. 474; 14 Vin. Ab. 554, pl. 21.<sup>(e)</sup> 14 Vin. Ab. 551, pl. 6.; Cro. Car. 244; Jo. 254.<sup>(f)</sup> See also 14 Vin. Ab. 555, pl. 23.<sup>(g)</sup> Palm. 217; 14 Vin. Ab. 554, pl. 22.<sup>(h)</sup> *Stockbridge's case*, Cro. Eliz. 24. See 14 Vin. Ab. 549, pl. 1, in margin.<sup>(i)</sup> 1 Eq. Ca. Ab. 220; 14 Vin. Ab. 555, pl. 25.

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Hen. 8th, c. 36, so that the wife had no power to bar the estate tail by her fine.[1]

The defendant, whose case is now to be considered, has pleaded a fine levied, by the wife, of a part only of the estate claimed by the bill, and has averred, in his plea, that such part is the only portion of the estate in which he claims any estate, title or interest; and he insists that in point of law the wife was entitled to levy this fine. And if he be right in point of law, and the plea be true in fact, then, as regards this defendant, the plea is an answer to the whole case of the plaintiffs. The defendant has not, however, shaped his plea as a bar to all the discovery and relief sought by the bill; but has submitted to answer the bill as to the several deeds and facts upon which the plaintiffs' title and his own title are founded, and as to the custody and possession of the deeds and papers relating thereto.

The effect of a plea is, for the purpose of the plea, to admit all matters stated in the bill which are not denied by the averments in the plea: [\*573] and a plea is a good bar \*to the whole bill, where, admitting all such matters, the fact pleaded would be a conclusive answer to the plaintiff's case. Now here, admitting every fact alleged in the bill, if it be true that such fine as stated in the plea was levied, and that the defendant has not, nor ever had any interest in any part of the estate not covered by the fine, and the law be, as this defendant insists it is, the whole case of the plaintiffs against this defendant is concluded; and the plea, therefore, ought to have been shaped as a plea to the whole bill: and the consequence is that the defendant, having answered to matter covered by the plea, the plea must be overruled.[2]

It may be proper to observe that the plea, being in effect a disclaimer as to all the estates claimed by the bill, except the land called The Pant, it ought to have averred, not only that he did not claim any interest in any other part of the property, but that he never had nor claimed any interest in such other part; and, further, that the plea ought not to have contained the averments which follow, as to Ann Constable; because these several facts, being alleged in the bill, are, in effect, admitted by the plea. Generally speaking, the court will not permit a plea accompanied by an answer to be taken off the file. But, as the question in the cause may, as to this defendant, be decided on a plea properly framed, it is plainly for the interest of the plaintiffs, as well as the defendant, that this plea and answer should be taken off the file, and that the defendant should be at liberty to file a new plea: and let the order be to that effect.

[1] The fine was afterwards decided to be a bar. *Watkins v. Lewis and others*, Tamlyn, 447.

[2] Vide *Thring v. Edgar*, ante 274.

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1826.—Lowe v. Williams.

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\*LOWE v. WILLIAMS.

[\*574]

1826, 1st June.—*Impertinence.*

Prolixity in setting forth important documents is not impertinence, therefore, where the defendant set forth verbatim in his answer a state of facts, and all the affidavits to show that the demand made in this suit had been disallowed by the master in a former suit, the court held that the answer was not impertinent.

THE bill was filed by the personal representatives of Thomas Lowe, against the personal representatives of James Colclough. It stated that, from 1808, until the 8th of April 1819, Lowe employed Colclough as his attorney, solicitor and agent: that Colclough became entitled to make out and charge Lowe with divers bills of costs, fees and disbursements: that Colclough did not in his lifetime make out and deliver to Lowe any bill of costs, or any account in regard to the matters aforesaid: that, in the beginning of the year 1822, the defendant delivered to Lowe what he, the defendant, termed the general account of all transactions between them, whereby he made out that Lowe was indebted to the estate of Colclough in the sum of 932*l.* 2*s.* 3*d.*: that, before the account could be finally settled, and soon after delivery thereof, Lowe died.

The bill charged that the account was never finally settled; that it contained charges of interest on Colclough's bill of costs, and that in it no credit was given for several sums of money therein specified. and stated to have been received by Colclough from Lowe, or on his account.

The prayer was for an account of all the dealings and transactions, receipts and payments between or on account of Lowe and Colclough: that the defendant might furnish the bills of costs; and that the same might be taxed, and the amount thereof, when taxed, \*included in the accounts; and [\*575] that the true balance might be ascertained; and, if found due from the estate of Colclough, that the defendant might account for his assets, and such assets be duly administered.

The defendant, in a schedule to his answer, set forth a copy of the account rendered to Lowe by Colclough in October 1815, and insisted upon it as a settled and stated account. He said that, in July 1821, a suit was instituted by certain persons, on behalf of themselves and all the other creditors of Colclough, against the defendant and others for the purpose of having Colclough's real and personal assets applied in payment of his debts; and that, by the decree made in that suit in December 1822, the usual reference was made to the master to take an account of Colclough's real and personal estate, and of his debts: that, in July 1823, the plaintiffs, Thomas Lowe and Richard Lowe, claiming to be creditors of James Colclough in the sum of 934*l.* 15*s.* 3*d.* brought in, in that suit, a state of facts, in support of their claim (the contents of which were fully set forth in the answer,) and which were, in substance, the same as those of the bill before stated. The answer also set forth, verbatim, an affidavit, filed by Lowe's representatives, in support of their state of facts, in which they stated receipts given by Colclough, and other circumstances of

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 1826.—*Marsack v. Bailey.*


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evidence, with a view to prove that Colclough had received every one of the sums for which they alleged that credit was omitted to be given in the account delivered by the defendant. The answer then stated that, in opposition to the claim made by Lowe's representatives, the defendant delivered into the master's office a state of facts, to the effect stated in an affidavit, which [\*576] was set forth, verbatim, in the answer, \*and in which the defendant deposed, amongst other things, that he verily believed that there was then due from Lowe's to Colclough's estate the sum of 235*l.* 11*s.* 8*d.*, the particulars of which were set forth in an account annexed to the affidavit, and which he also set forth in the body of his answer. He then said that the master, after a full and fair consideration of the plaintiffs' claim, and evidence in support of and in opposition to it, disallowed that claim, and recommended the defendant to bring an action against the plaintiffs for the purpose of recovering his balance of 235*l.* 11*s.* 8*d.* and that in consequence of that recommendation he had brought an action against the plaintiffs for the balance.

The plaintiffs referred this answer for impertinence: and the master was of opinion that it was impertinent, so far as it stated at length the state of facts, and the affidavits in support of and in opposition to it. The defendant then excepted to the master's report.

Mr. Agar, and Mr. Wakefield, supported the exception.

Mr. Heald, Mr. Roupell, and Mr. Wheatley, opposed it.

The VICE-CHANCELLOR:—I cannot adopt the opinion which the master has in this case expressed. The very language of these documents, and every particular of the claim and resistance, may prove very important in the future consideration of the present case, and are therefore not improperly introduced, nor to be considered as impertinent. Irrelevant they cannot be [\*577] called; and if they had admitted \*of abridgment or general description it would subject a pleader to insuperable difficulties if relevant matter is to be deemed impertinent wherever it is less concisely expressed than the nature of the case necessarily requires. The safer check against abuse in length is in costs.[1]

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#### MARSACK v. BAILEY.

1826, 2d June.—*Practies.—Injunction.*

The plaintiff obtained the common injunction after four proclamations had been made under an *exigent* issued in an action commenced against him by the defendant. Held, that it was a breach of the injunction for the defendant to sue out a writ to compel the sheriff to make the fifth proclamation.

AFTER a writ of *exigent* had issued, on the application of the defendant, for

[1] Vide *Byde v. Masterman*, 1 Craig & Phillips, 265; *Webster v. Threlfall*, ante 190. *Parker v. Fairlie and others*, 1 Sim. & Sta. 295.

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1826.—*Johnstone v. Ure.*

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the outlawry of the plaintiff, and four proclamations had been made under it the plaintiff obtained the common injunction. The sheriff afterwards returned the writ of *exigent*, without making the fifth proclamation, for want of another county court before the return; and, thereupon, the defendant sued out a writ of *allocatur exigent*, to compel the sheriff to make the fifth proclamation.

The plaintiff now moved that the defendant might be committed for a breach of the injunction, in suing out this writ.

Mr. *Sugden*, and Mr. *Ching*, for the motion, cited *Bullen v. Ovey*.(a)

Mr. *Moore*, contra.

The VICE-CHANCELLOR :—The order for the injunction stays all proceedings at law, with the exception, that if the defendant is in \*such a [\*578] condition at law that he can demand a plea, he is at liberty to do so, and to proceed to trial and judgment, with stay of execution.[1] Here there was no declaration; and there could be no demand of a plea; and the proceeding is, plainly, a breach of the injunction. On this writ of *allocatur exigent* the plaintiff in equity might have been arrested. The contempt not being wilful let the defendant supersede his writ, and pay the costs of the application.

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#### JOHNSTONE V. URE.

1826, 3d June.—*Practice*.—*Impertinence*.

An order for referring a defendant's examination for impertinence, cannot be obtained as of course, if the plaintiff has proceeded on the examination.

THIS was an application, by the defendant, to discharge an order which the plaintiff had obtained, as of course, for referring it to the master to inquire whether the examination of the defendant before the master was impertinent, upon the ground that the plaintiff, having proceeded before the master upon the examination, was too late to obtain this order as of course: and, upon that ground the Vice-Chancellor discharged the order.

Mr. *Heald*, and Mr. *Wright*, supported the motion.

Mr. *Horne*, and Mr. *Roupell*, opposed it.

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#### \*KING V. MOODY.

[\*579]

1826, 6th and 13th of June.—*Mistake*.—*Copyholds*.—*Appertienment*.

The lord of a manor being seized of it in fee, subject to an executory devise over, purchased an estate, partly freehold and partly copyhold of the manor, and afterwards under an inclosure act, carried in two claims, one in respect of the devised and the other in respect of the purchased es-

(a) 16 Ves. 141.

[1] Vide *Jenkins v. Wilde*, 2 Paige, 394.

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 1826.—King v. Moody.
 

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tate, and obtained two allotments accordingly. He afterwards died, and the executory devise took effect; held, that the copyhold part of the purchased estate, being extinguished in the manor, passed with it to the executory devisee, who was also entitled to so much of the allotment obtained in respect of the purchased estate as was proportionate to the value of the copyhold part; and it was referred to the master to apportion the allotment accordingly.

WILLIAM FROST, the late father of the plaintiff Rebecca King, being seised in fee of the manor of Brinkley in Cambridgshire, and other hereditaments, disposed of them by his will as follows:—"I give and bequeath to my son William Frost, and his heirs for ever, all my houses and lands, with all their appurtenances thereunto belonging; and, if the said William should have no children, child or issue, the said estate is, on the decease of the said William Frost, to become the property of the heir at law, subject to such legacies as he the said William Frost may leave by will to any of the younger branches of the family."

The testator died soon after the date of his will, leaving William Frost, his only son, and Rebecca King, his only daughter him surviving. Upon the testator's death, William Frost, the son, took possession of the estates devised to him, and amongst them, of the manor of Brinkley. In the year 1809, whilst he was lord of that manor, he purchased from certain persons named Purchas, an estate, situate in and near the parish of Brinkley, consisting of a farm-house and buildings, and 21 acres of enclosed arable and pasture land, and 165 acres of arable and lammas land, lying, dispersedly, in the fields [\*580] of Brinkley. Part of these lands was copyhold \*of the manor, and the residue was freehold, and not holden of the manor.

In November 1809, the freehold parts of the premises so purchased were conveyed to William Frost, the son, and his heirs; and, on the 21st of the same month, the Purchas's, in consideration of 650*l.* paid to them by Frost, the lord of the manor of Brinkley, surrendered, out of court, into the hands of the lord of the manor, by the hands and acceptance of the steward, all those 28 pieces of land, lying dispersedly in the fields and bounds of Brinkley, Weston and Winningham, in the county of Cambridge, some or one of them, containing together by estimation 32½ acres, more or less, with their appurtenances (being the copyhold part of the hereditaments so purchased,) to the use of Wm. Frost, his heirs and assigns, according to the custom of the manor. This surrender was afterwards duly presented at a general court baron and customary court of the manor.

In 1811 an act of parliament was passed, intituled; "An act for inclosing lands in the parish of Brinkley, in the county of Cambridge," whereby it was, amongst other things, enacted that in case any proprietor or proprietors of any of the lands and hereditaments thereby directed or authorized to be divided, allotted or exchanged, should hold his, her or their respective lands or hereditaments for different estates, or by different tenures, the commissioners should ascertain and distinguish the lands and other hereditaments held for each of such estates, and by each of such tenures respectively, and should also set out and distinguish the different allotments and other hereditaments to be accepted

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and taken by such proprietor or proprietors respectively, as an equivalent in respect of each of \*such estates respectively, and that the [\*581] commissioners should set forth and declare, in and by their award, in right of what estates in particular such allotments should have been respectively made; and should therein also separately describe and ascertain the situation of every such allotment; and, that, in all cases where the proprietor or proprietors of any of the lands or hereditaments which should be allotted, divided or exchanged by virtue of that act, should hold his, her or their respective lands or hereditaments for different estates, or by different tenures; and where, from the want of necessary information, or from any other cause, the commissioners should in their award have omitted to distinguish and ascertain the lands or other hereditaments holden for each of such estates, and by each of such tenures respectively, and to set out and award several and distinct allotments for such lands and other hereditaments respectively as thereinbefore was required, or where the commissioners should, in their award, have mis-stated the estate or tenure for or by which any such lands or other hereditaments were or should be holden, and should have made any allotment or allotments for such last-mentioned lands or other hereditaments, it should be lawful for the commissioners, at any time within twelve calendar months next after making their award, upon request made to them for that purpose by any person or persons interested in any such omission or mis-statement, by writing under his, her or their hands, to supply or correct such omission or mis-statement, by a separate instrument; and, so far as might be requisite for that purpose, to examine witnesses, and to proceed and act, in every other respect, as if their award had not been made: and, when they should have obtained such information in the matter as they might judge \*sufficient, [\*582] they were thereby also authorized and required, by deed under their hands and seals, to distinguish and set forth the true estates and tenures for or by which the lands and hereditaments in respect of which such omission or mis-statement should have arisen should be respectively holden, and to make distinct and several allotments in respect thereof accordingly, in like manner as they were thereby required to do in their award, as if no such omission or mis-statement had happened; and that every such separate instrument should be annexed to their award, and be enrolled and deposited therewith, and that evidence should be given thereof in like manner as by the act was directed concerning their award; and that all reasonable expenses incurred in or about such separate instrument should be paid by the person or persons who should have required the commissioners to make and execute the same, or by his, her or their heirs, executors and administrators; and that every such separate instrument should, from and immediately after the due execution thereof by the commissioners, have the same effect, to all intents and purposes, as if the contents thereof had been inserted and contained in their award; and that a duplicate of such instrument should be delivered to the person or persons upon whose request any such omission or mis-statement should have been supplied



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or corrected, or to the person or persons to whom the custody of the deeds and writings concerning the title of the lands, hereditaments or allotments mentioned in such instrument, should, in the judgment of the commissioners, belong.

After the passing of this act Frost delivered in to the commissioners a claim in writing, in which he claimed to be entitled, as well to the hereditaments devised by \*the will of his father, as to the hereditaments so purchased by him. That claim was partly as follows : "Gentlemen, —I claim to be lord of the manor of Brinkley, and, as such, entitled to the manorial rights thereof. I also claim a freehold farm-house and buildings, and twenty-one acres of inclosed arable and pasture land, and 165 acres of inclosed arable and lammas land, lying dispersedly in the fields of Brinkley aforesaid, late Purchas's, in my own occupation. I also claim common rights to the same for one and seven cows, upon the said green and common of Brinkley." The commissioners, by their award, dated the 24th of January 1816, made one allotment to Wm. Frost (which they described by its boundaries and number of acres,) as a compensation for his interest, as lord of the manor, in the soil and waste lands of the parish ; another, which they described in like manner, for his interest, in right of his entailed estate, in the open and common fields, commons and waste grounds ; and a third (similarly described) in right of his estate in fee in the same.

Wm. Frost, by his will, dated the 10th of July 1810, after reciting the will of his father, exercised the power, given by that will, of charging the estates therein comprised with the payment of certain legacies to the younger branches of the family ; and, after making various bequests, gave all the residue of his manors, messuages, lands and hereditaments, to Catherine his wife, her heirs and assigns. In October 1818, Wm. Frost, the son, died, leaving his wife, and the plaintiff, Rebecca King, his sister and heir at law, who thereupon became the heir at law of her father.

[\*584] \*On the decease of Wm. Frost his wife took possession of the manor of Brinkley, and of the whole of the lands so allotted under the inclosure act, claiming to be entitled to the same under the will of her late husband. She afterwards married the defendant Moody. After the decease of Wm. Frost, the plaintiffs, King and his wife, brought an action of ejectment, in the court of king's bench, against Frost's widow, to recover possession of the manor of Brinkley, and the other property devised by the will of Wm. Frost the elder. On the trial of this action a special verdict was found, which was argued in Easter term in 1820 ; and the court ultimately ordered judgment to be entered up for the plaintiffs in the action, which was accordingly done. Under this judgment the plaintiffs, King and his wife took possession of the manor and other estates devised by Wm. Frost the father.

The bill was filed in 1820. It insisted that the copyhold hereditaments having been, in manner aforesaid, surrendered to Wm. Frost the younger, were absolutely merged and extinguished in the manor ; and that, therefore, he, hav-

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ing been, at the time of the passing of the inclosure act and of the execution of the award, seised in fee, as well of the hereditaments which were originally of copyhold tenure, and which were so extinguished in the manor, as also of the freehold lands so purchased by him, the commissioners did not, in their award, set out or declare what part of the lands so allotted to him were allotted in lieu or in respect of the lands which were originally of copyhold tenure, and what part of the said lands were so allotted in lieu of the freehold lands so purchased by him.

\*The prayer of the bill, therefore, was, that it might be ascertained [\*585] what part of the allotment was made by the commissioners in respect of the copyhold lands so purchased and surrendered as aforesaid; and that the same might be distinguished by metes and bounds: and that a commission might issue to ascertain the same; and that it might be declared that the plaintiffs were entitled to such part of the allotment as should be so ascertained and distinguished; and that the defendants might be decreed to deliver up to the plaintiffs the possession of the same.

The defendants, in their answer, after setting forth the clause before mentioned in the Brinkley inclosure act, stated that, under that act and the general inclosure act, the award of the commissioners, unless the same was corrected within the time and in the manner prescribed by the Brinkley inclosure act, became binding and conclusive upon all persons to all intents and purposes: that, at the time of the passing of the Brinkley inclosure act, Wm. Frost was seised only of the manor of Brinkley and the lands which were parcel thereof, and which formed his entailed estate, and of the lands which had been purchased by him, as in the bill mentioned, which had not merged in the manor, and of which he was seised in fee-simple; and it, therefore, became necessary for the commissioners to make distinct allotments in respect of the entailed estate, (that is to say,) the estate recovered by King and his wife, and the estate of which Wm. Frost was seised in fee, and which passed by his will to the defendant, Catherine Moody: and that the commissioners accordingly, by their award, which was duly made and executed, and enrolled with all the formalities \*required by the said several acts, set [\*586] out and allotted to Frost divers lands in respect of his entailed estate, and divers other lands in respect of his estate in fee: and that the different allotments were, by the award, declared to be made in respect of the different estates, and the particular parcels of land described in the bill, and of which a partition was thereby sought, were set out and allotted in respect of the estate in fee, as contradistinguished from the entailed estates; and that the award declared that the same were set out in lieu of Wm. Frost's estate in fee, by a declaration as follows: "which said three several allotments we do adjudge and deem to be a just compensation and satisfaction for the respective lands, grounds, rights of common, and other the rights and interests of the said Wm. Frost, which he is seised of in fee, in the open and common fields, commonable lands, commons, heaths and waste grounds, by the said act di-

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rected to be divided and allotted; and also in lieu of and for the following pieces or parcels of land, or old inclosures, hereinbefore allotted and awarded to the rector of Brinkley from the fee-simple estate of the said Wm. Frost, (that is to say,) all that old inclosure, called Shrub Pasture, No. 8, containing 4 acres and 22 perches, and also all that old inclosure called Bob's Pasture, No. 9, containing 3 acres and 18 perches; and also of and for the following piece or parcel of land, or old inclosure, called Bye's Pasture, No. 8, containing 5 acres, 1 rood, 34 perches, hereinbefore assigned, allotted and awarded to the entailed estate of the said Wm. Frost, from the estate of which he is seised in fee." The answer further stated that all the several parcels of land particularly described in the extract from the award, were parcel of the free- [\*587] hold lands purchased \*by Wm. Frost, and not of the copyhold purchased by him: that, thereby, the commissioners set out the allotments, particularly described in the bill, in respect of the lands which passed to the defendant Catherine Moody, under the will of Wm. Frost the son, those being the only lands of which he was seised in fee, as contradistinguished from his entailed estate: that no objection was ever made to the award by the plaintiffs, or any persons interested under the will of Wm. Frost the elder; and that the same was never altered by the commissioners in the manner, in which, if any mistakes were made by them, they were enabled to correct the same; and that the same was binding and conclusive upon the plaintiffs and all other parties.

Mr. Sugden, and Mr. Rolfe, appeared for the plaintiffs.

Mr. Horne, Mr. Pemberton, and Mr. Biggs Andrews, for the defendants.

It is unnecessary to insert the arguments at length, as the substance of them is stated in the judgment.

The cases cited were *St. Paul v. Lord Dudley and Ward*, (a) for the plaintiffs, and *Morgan v. Mather*, (b) and *Knox v. Simmonds*, (c) for the defendants.

The evidence alluded to in the judgment was that of one of the commissioners, and their clerk. It related to the claim made by Frost before the commissioners, and the representations, made by him on that occasion, [\*588] \*that he had an estate tail in the devised lands, and an estate in fee in the others. The ground of the objection to this evidence was that it tended to contradict the award.

The VICE-CHANCELLOR :—In this case, William Frost, lord of the manor of Brinkley, as tenant in fee, with a gift over by way of executory devise, purchased a certain estate, partly freehold, and partly copyhold, held of the manor of Brinkley, the freehold part of which was duly conveyed, and the copyhold part duly surrendered to him and his heirs; and it is not denied that, by the effect of this surrender, the copyhold, at law, became annexed to and parcel of the manor, so as to be subject to the executory devise of the manor. It is proved in the cause, by evidence, which was objected to, but which I

(a) 15 Ves. 167.

(b) 2 Ves. jun. 15.

(c) 3 Bro. C. C. 358; S. C. 1 Ves. jun. 263.

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considered myself bound to admit, that an act of parliament afterwards passed for inclosing lands in the parish of Brinkley ; and that William Frost, mistakenly considering that, by the effect of his purchase and the surrender to him, the copyhold, as well as the freehold which he had purchased with it, had become his fee simple estate, carried in to the commissioners under the inclosure act two claims, one for his entailed estate, meaning thereby the estate limited over by way of executory devise, excluding therefrom the copyhold which had become parcel of the manor, and the other, for his estate in fee, including in the description of the latter estate the copyhold part of the purchased estate ; and the commissioners, adopting his mistaken view of the case, made two distinct allotments for what he called his entailed estate, and for what he called his estate in fee, including in the latter an allotment \*in respect of the copyhold part of the estate purchased. [\*589]

William Frost is since dead ; and the executory devise over of the manor of Brinkley having taken effect in favor of the plaintiffs, the present bill is filed for the purpose having it determined what part of the allotment so professed to be taken for the estate in fee of William Frost, is to be considered as having been made in respect of what had been copyhold, the plaintiffs insisting that such copyhold having become parcel of the manor, they, and not the defendants, who are the general residuary devisees of William Frost, are entitled to this portion of the allotment, and the case of *St. Paul v. Lord Dudley*, is relied upon by them as in point.

For the defendants it has been first argued that the question, whether, by the surrender, the copyhold did or not become parcel of the manor, is a mere legal question, and that the plaintiffs ought to be left to law. The obvious answer is, that one allotment being made in respect of the whole purchased estate, the plaintiffs cannot recover, at law, any particular portion of the allotment, as belonging to the part which had been copyhold, and the plaintiffs are, necessarily, driven into equity in order to have a certain parcel of the allotment set out by a court of equity, as being equivalent to the proportionable value between the freehold and copyhold.

It is next argued that William Frost, by including in his claim what had been copyhold, as a part of his own estate in fee, plainly manifested that it was not his \*intention that it should become parcel of the man- [\*590] or, but should remain at his disposal ; and, as he had the power during his life, to separate it again from the manor, it is to be inferred that he would have done so if he had not mistaken the law ; and that a court of equity therefore, will not assist the plaintiffs against the actual intention of the real owner of the property.

Where, by law, a certain act is necessary in order to give effect to intention, courts of justice are disinclined to infer a perfect intention where the act required is not done, as in the case of a will of lands not duly attested ; and, in the case referred to, Lord Dudley, as to the copyhold within the manor of Kingswinford, had manifested the same ignorance of the law, and the same

1896.—*Parker v. Fearnley.*

intention that the copyhold purchased and surrendered to him should not be annexed to and descend with the manor, by comprising it in the mortgage to Smith, for the sum of 8,000*l.* borrowed by him; and, though the Lord Chancellor held that the mortgagee might have compelled the remainderman to regrant the copyhold, according to the covenant to surrender in the mortgage deed, yet no such re-grant having been made, he was of opinion that Lord Dudley's general devisees had no equity against the remainderman. If, in such cases, the devisee has no equity, it can make no difference whether the remainderman be defendant, as in the case of *St. Paul v. Lord Dudley*, or plaintiff, as in this case.

Declare that the plaintiffs are entitled to so much of the allotment, professed to be made in respect of the estate in fee of William Frost, as was actually made in respect of the copyhold land surrendered to him and [\*591] his \*heirs by John Purchas, the elder, and John Purchas, the younger and William J. Purchas, on the 21st of November 1809; and refer it to the master to apportion the said allotment accordingly: and let the defendant deliver up to the plaintiffs the possession of that part of the allotment which the master shall so apportion to the plaintiffs in respect of the said copyhold lands; and let the master take an account of the rents and profits of the said allotment which have arisen, or become due, since the death of the said William Frost; and let him apportion the said rents and profits, and ascertain and state how much of such rents and profits is to be attributed to that part of the said allotment which he shall find to belong to the plaintiffs, according to the declaration aforesaid; and let the defendants pay the amount of such rents and profits to the plaintiffs, Robert King and Rebecca his wife: and let any party interested be at liberty to apply as they shall be advised.

[\*592]

\*PARKER v. FEARNLEY.

1826, 8th June.—*Will.—Construction.*

Testatrix directed her legacies to be paid by her executor to whom she afterwards gave all her real estates, and the residue of her personal estate after payment of her debts and funeral expenses. Held that the legacies were not charged on the real estates.

Mrs. ALICE FEARNLEY, bequeathed her household furniture, plate, china, linen and wearing apparel, and a sum of 600*l.* to her daughter, Ann Parker. She also bequeathed to another of her daughters the sum of 100*l.* and gave several small legacies to other persons. She then directed that the legacies which she had given should be paid within two years after her decease, by her executor thereafter named, to such of the legatees as should then have attained the age of twenty-one years, and to the others as and when they should attain that age. She next devised a real estate, which she particularly mentioned, and all other her real estates, unto her son Charles, in fee; and, as to all the rest and residue of her said personal estate which should remain after payment

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of her just debts and funeral expenses, she gave the same to her said son, for his own use and benefit, and appointed him sole executor of her will.

The bill stated that the testator's personal estate, at the time she made her will, was very small; and insisted that the legacies were well charged on the real estate.

The defendant, C. Fearnley, put in a general demurrer to the bill.

Mr. Sugden, and Mr. Swanston, in support of the bill.

\*The first observation that arises on this will, is that the legacies [\*593] are not directed to be paid until two years after the testatrix's death, which is not the usual period for the distribution of personal estate; so that the testatrix must have had something in view beyond personal estate. Next, the legacies are to be paid by the executor, to whom all the real estate and the residue of the personal estate are afterwards given. But the personal estate is given to him after payment of debts and funeral expenses, but not of the legacies. At all events, if the legacies are not charged on the real estate, the devisee must be put to his election, and not be permitted to retain that estate, unless he pays the legacies. *Powell v. Robins.*(a) *Williams v. Chitty.*(b) *Keeling v. Brown.*(c)

Mr. Heald, and Mr. Sidebottom, in support of the demurrer, were stopped by the court.

The VICE-CHANCELLOR:—The court cannot take into consideration the amount of the personal estate, nor indulge conjectures as to the intention of this testatrix, but must be governed by her expressions; and there is no expression in this will which would justify me in stating that it was the intention of this testatrix that her pecuniary legacies should be charges on her real estate devised to her executor.[1] I cannot infer that the legacies were to be so charged, because she has directed that her legacies should be paid by her executor; for, by law, pecuniary legacies are to be paid by him: nor because she has made her executor the residuary legatee of her personal estate, \*after payment of her just debts and funeral expenses, without men- [\*594] tioning legacies; for pecuniary legacies are imposed, by the law, upon the residue of the personal estate, after the payment of just debts and funeral expenses: and the omission of such direction in the will is immaterial, unless there be words in the will directly affecting the real estate.[2]

(a) 7 Ves. 209.

(b) 3 Ves. 545.

(c) 5 Ves. 359.

[1] Vide *Warren v. Davies*, 2 Mylne & Keene, 49.

[2] "The real estate is not, as of course, charged with the payment of legacies. It is never charged unless the testator intended it should be, and that intention must be either expressly declared, or fairly and satisfactorily inferred, from the language and dispositions of the will. This general rule does not seem to admit of dispute. If that residuary clause created such a charge, the charge would have existed in almost every case, for it is the usual clause, and a kind of formula in wills. It means only, when taken distributively, *reddendo singula singulis*, that the rest of the personal estate, not before bequeathed, is given to the residuary legatees, and that the remainder of the real estate, not before devised, is in like manner disposed of. It means that the testator does not intend to die intestate as to any part of his property, and it generally means nothing more,—

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 1826.—British Museum v. White.
 

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The Trustees of the BRITISH MUSEUM v. WHITE.

1826, 30th May, and 8th July.—*Mortmain*.—*Charity*.

A devise to the British Museum is within the stat. of mortmain; and so is every devise for a public purpose, whether local or general.

WILLIAM WHITE, deceased, devised a freehold estate to trustees, in trust to sell it, and pay the proceeds, together with his residuary personal estate, to the trustees of the British Museum, to be by them employed for the benefit of that institution. The question was, whether this devise was void under the 9th Geo. 2d, c. 36?

The *Solicitor-General*, Mr. Bligh, and Mr. Coote, for the trustees of the Museum:—The British Museum is not a charitable institution. It was founded by the munificence of the state for the benefit of the public. Every gift for the use of the public is not, necessarily, a charity. There must be something in the nature of relief to constitute a charity. Gifts to support a public bridge, and for the repair of sea-banks, have, on that principle, been held to [\*595] be charitable gifts. So schools for learning have been held to be charitable institutions: not so schools of art.(a) Now this is a school of art. Besides, the Museum is national property: and, for that reason, it was held, in *Thellusson v. Woodford*,(b) that the devise to the king, for the use of the sinking fund, was good.

But if the British Museum should be held to be a charitable institution, still this devise is good, under the 26th Geo. 2d, c. 22, by which the Museum was established: for it is thereby enacted:(c) "That, for the better execution of the purposes of this act, the said trustees, hereby appointed, shall be a body politic and corporate in deed and name, and have succession for ever, by the name of 'the trustees of the British Museum;' and, by that name, shall sue and be sued, implead and be impleaded, in all courts and places within this realm, and shall have power to have and use a common seal, to be appointed by themselves, and to make bye-laws and ordinances, for the purposes of this act; and to assemble together, when, where, and as often, and upon such notice, as to them shall seem meet, for the execution of the trust hereby in them reposed; and shall also have full power, capacity and ability to purchase, take, hold and enjoy, for the purposes of this act, as well goods and chattels, as lands, tenements and hereditaments, so as the yearly value of such lands shall not exceed 500*l*. above all charges and reprises, the statute of mortmain,

(a) *Duke*, 128.

(b) 4 *Ves*. 227.

(c) See sect. 14.

When the real estate is charged, and not in the most explicit and direct terms, it is usually done in terms that indicate a pretty clear intention that the legacies were at all events to be paid. It is not sufficient that debts or legacies are directed to be paid. That alone does not create the charge, but they must be directed to be *first*, or *previously* paid, or the devise declared to be made *after* they are paid." *Kent Ch. Lupton v. Lupton*, 2 *Johns. Ch. Rep.* 623. See further, *Gridley v. Andrews*, 8 *Conn. Rep.* 1. *Downman v. Rust*, 6 *Randolph, (Virg.) Rep.* 587.

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 1826.—*Blommart v. Player.*


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or any other statute and law to the contrary thereof, in any wise notwithstanding."

\**Mr. Horns*, and *Mr. Parker*, for the defendant, the testator's heir, [\*596] contended that the British Museum was no more national property than a hospital, or college of royal foundation; and that the devise in question was void, as being within the statute of mortmain.

The VICE-CHANCELLOR:—It has long been settled, by authority, that a gift of the price of land is, in effect, a gift of land within the 9th Geo. 2d.; because it is possible that the land itself may be acquired by means of such a gift. In *Mr. Thellusson's* will there was a residuary gift, in certain events, towards payment of the national debt: but those events have not yet happened, nor probably ever will happen; and no decision has yet taken place with respect to the validity of that gift. But, in this will, there is no such gift to the nation; but a gift to an institution, established by the legislature, for the collection and preservation of objects of science and of art, partly supplied at the public expense, and partly from individual liberality, and intended for the public improvement. I consider that every gift for a public purpose, whether local or general, is within the 9th Geo. 2d., although not a charitable use within the common and narrow sense of those words: and, consequently, I must declare this devise void as to the real estate.(c)

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\*BLOMMART V. PLAYER.

[\*597]

1826, 10th July.—*Election.*

Where it was not apparent on the face of the will, that a general devise in trust to sell was intended to include a particular estate, of which the testatrix had been wrongfully in possession up to the time of her death, the rightful owner of that estate was not put to his election in respect of an interest bequeathed to him in the money to be produced by the sale of the estate.

THOMAS GREGORY PLAYER, being seised of certain freehold and copyhold estates, by his will gave all his real and personal estate of every description whatsoever, and whether in possession, reversion, remainder or expectancy, with all the appurtenances thereto belonging, unto his wife Isabella Player, her heirs, executors, administrators and assigns.

The testator left a son, who was his heir at law and customary heir, and two daughters, surviving him. The widow, at the death of the testator, entered into the possession of all her late husband's real estates, including the copyholds; and, being so in possession, she, by her will, devised to the plaintiffs all the freehold and leasehold lands, late of or belonging to her late husband, and all and singular the personal estate, late of or belonging to her late husband, and all other her real and personal estate whatsoever, except any

(a) See *Attorney General v. Heelis*, ante 67.



1826.—*Blommart v. Player.*

copyhold messuages, lands, tenements and hereditaments of, or to which she was, or should or might be seised or entitled, upon trust to sell and convert the same into money: and she then empowered and required her trustees to sell and dispose of all such copyhold messuages, lands and tenements as then were, or thereafter should or might be vested in her, and every part thereof, with their appurtenances; and directed that the moneys arising from [\*598] all the said \*property so to be sold and converted by her trustees, should be divided into three parts, and she gave one third part thereof to her son, and the other two parts to her daughters.

The son, after her death, claimed the copyhold lands, which had belonged to his father, and been enjoyed by his mother, upon the ground that they did not pass to his mother by his father's will, and, ultimately, recovered possession of them in an action of ejectment in the court of common pleas.

The bill was filed by the testator's two daughters, praying that the trusts of the mother's will might be carried into effect, and that it might be declared that the copyholds passed, by the father's will, to the mother, or that the son was bound to elect between the copyholds, and the third part of the produce of the property directed to be sold, which was given to him by the mother's will.

The *Solicitor General*, Mr. *Heald*, Mr. *Shadwell*, Mr. *Roupell*, and Mr. *Bickersteth*, for the plaintiffs.

Mr. *Horne*, Mr. *Sugden*, and Mr. *Rayley*, for the defendant, the son.

The VICE-CHANCELLOR:—It having been decided, by the court of common pleas, that the copyholds did not pass to the mother by the father's will, this court will not review that judgment. If the judgment be complained [\*599] of, the \*proper course is to review it, by writ of error, in the exchequer chamber.

There is no election, unless it be manifest, upon the face of the will, that the mother intended to pass, by her will, the copyholds which had belonged to the father. Her direction to the trustees is, that they are to sell and dispose of all such copyhold messuages, lands and tenements as then were, or thereafter should or might be vested in her. According to the decision of the court of common pleas, the copyholds which had belonged to the father were not then, or at any time thereafter, vested in her: and there is not, therefore, any intention, apparent upon the face of the will, that the copyholds which had belonged to the father, should pass thereby. It must, therefore, be declared that the customary heir is not put to his election.[1]

[1] Vide *Naylor v. Wetherell*, 4 Sim. 114.

1826.—James v. Biou. Owen v. Flack.

\*JAMES v. BIOU. OWEN v. FLACK.

[\*600]

1825, 6th December; 1826, 31st May.—*Trust.—Equity of Redemption.—Evidence.*

A trustee in receipt of the rents and profits of a mortgaged estate, under an old conveyance of the equity of redemption, upon trust to sell and pay off certain debts which had been long since satisfied, is not entitled to redeem the mortgage.

Payment of money, though evidence against the payer of the title of the party receiving it, is not evidence against the receiver that the payer was the party bound to pay it.—The suppression of some of a series of documents relating to the title, which are admitted to be in the possession of a party, is evidence that the documents withheld afford inferences unfavorable to the title of that party.

Payment of money is evidence against the payer of the title of the party receiving it, but is not evidence against the receiver, that the payer was the party bound to pay it.

The suppression of some of a series of documents admitted to be in possession of the party who produces the others, is evidence that the documents withheld afford inferences unfavorable to that party who withholds them.

This was an original and revived suit for the redemption of mortgaged estates, and for a re-conveyance upon the trusts of certain deeds executed in the year 1781.

The original bill was filed in November, 1817,(a) and the case made by it, and by a bill of revivor and supplement, was, in substance, that, in 1781, Sewell Mansell was seised in fee of the estates in question, subject, as to part, to a mortgage in fee for securing 300*l.* and interest, and, as to other part, subject to a mortgage in fee for securing 400*l.* and interest; that, in July 1781, these two mortgages were vested in Susannah Biou, the defendant to the original bill, and Frances Biou, deceased; that, for many years previous to 1781, Sewell Mansell had regularly paid the interest on these mortgages to Susannah and Frances Biou; that, in 1781, an agreement was entered into between these parties for increasing the rate of interest on the mortgages from four per cent. to five per cent. per annum:

\*That, by indentures of lease and release, dated the 30th and 31st [\*601] of July, 1781, made between Sewell Mansell of the one part, and Abel Jenkins of the other part, Mansell conveyed the mortgaged estates to Jenkins in fee, upon trust to sell them, and apply the money to be produced by the sale in the manner directed by another indenture of even date, which was made between the same parties, and by which, after reciting the conveyance to Jenkins, and the two mortgages for 300*l.* and 400*l.*, and several other incumbrances and annuities to which the estates were subject, it was declared that Jenkins should stand possessed of the money to be produced by the sale of the estates, and of the rents and profits of them until they were sold, upon trust, out of the rents and profits, to keep down the interest of the mortgages and other incumbrances, and then to satisfy and pay off the principal moneys due in respect of the mortgages and other incumbrances, and to apply the

(a) See *James v. Biou*, 3 Swan. 231.

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 1826.—James v. Biou. Owen v. Flack.
 

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surplus in payment of the debts of Sewell Mansell mentioned on the back of this indenture, and to pay what might remain of the money produced by the rents and profits, and by the sale, after these various payments, to Sewell Mansell, his executors, administrators and assigns; that there were no debts mentioned on the back of the indenture, but that Abel Jenkins paid off the various debts which were in the contemplation of the parties at the time of the execution of these deeds, and also the various incumbrances affecting the estate, except the mortgages for 300*l.* and 400*l.* and one annuity, and during his life-time paid all the interest due on the mortgages as well as the annuity; that Abel Jenkins died in 1802, having devised to James and Owen (the plaintiffs in the original suit) all his freehold, copyhold and leasehold estates, upon trust to sell, and directed that the money to be \*produced by the sale should be considered part of his personal estate, and he gave the residue of his personal estate to the plaintiffs Abel Jenkins and his sister, Mary the wife of Charles Abbott, and appointed the plaintiffs James and Owen executors of his will; that Abel Jenkins, the testator, left the plaintiff Abel Jenkins, one of his residuary legatees, his heir at law; that the mortgaged estates, upon the death of the testator Abel Jenkins, either passed, by his will, to the plaintiffs Owen and Jenkins, as his devisees, or descended to the plaintiff Jenkins, as his heir at law, subject to the incumbrances still affecting them, and to the trusts of the deeds of July, 1781, so far as the same were unperformed; that Susannah Biou, having survived her sister, became entitled to all the interest in the mortgages of 400*l.* and 300*l.*; and, by her will, bequeathed these sums, and the securities for the same, to the defendant Flack, together with all the title deeds of the mortgaged estates; and directed that, as these mortgages had been sixty-three years in her family, the title deeds should not be delivered up to any one but the next legal heir; that Sewell Mansell, at the time of executing the deeds of July, 1781, was seised in fee of the equity of redemption, and that the plaintiffs were entitled to redeem, and that he had been in possession and receipt of the rents and profits up to the time of executing those deeds; and that, ever since, Jenkins, the original trustee, and the plaintiffs had been in receipt of the rents and profits; and that Susannah Biou and her sister had frequently admitted the title of Mansell, Abel Jenkins, and of the plaintiffs to redeem, as well by entering into the agreement to increase the rate of interest, as by receiving payment of the interest, and granting receipts for it as received from the parties entitled to the [\*603] equity of redemption. \*The bill prayed for a redemption of the mortgaged estates, and a re-conveyance of them upon the subsisting trusts of the indentures of July, 1781, or such other conveyance as the court should direct.

The receipts referred to in the bill were set forth in a schedule, and bore date during the period between 1776 and 1781; in 1802 and 1803; and from 1811 to 1816.

The answer of Susannah Biou to the original bill, stated that Abel Jenkins,

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 1826.—James v. Biou. Owen v. Flack.
 

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the original trustee, had been in receipt of the rents and profits of the estate, and had paid interest on the mortgages, as the agent or steward of the mortgagor; and that he never, in his life-time, claimed to be entitled to the equity of redemption; that the title of Sewell Mansell to the equity of redemption was never made out; that she admitted he was, in 1781, seised of the equity of redemption, but whether he was seised in fee, or how otherwise, she could not set forth; that the receipts set forth in the bill had been brought to her ready prepared, and were signed by her as a matter of course, and, therefore, ought not to conclude her from requiring the plaintiffs to show their title; that the plaintiffs had offered to show her those receipts, but that the receipts, signed between 1781 and 1802, and between 1803 and 1811, had not been produced to her, and were withheld from her inspection; that she admitted the indentures of July 1781 but denied any agreement with Mansell for increasing the interest, further than that, two years previous to its being increased to five per cent., she had applied to Abel Jenkins to have it increased, who promised to procure an advance of interest, and that it was afterwards advanced to five per cent \*accordingly; and she denied that [\*604] the plaintiffs had any title, even if it were true that Sewell Mansell had good title to convey in fee according to the deeds of 1781.

No witnesses were examined on either side.

Mr. *Hart*, Mr. *Heald*, and Mr. *Boteler*, for the plaintiffs:—Mansell, by the conveyance of July, 1781, vested in Jenkins all the rights of redemption that he had himself. He expressly directs Jenkins to redeem the mortgages, in the first place. It is true that the estate has never been sold: but, for any thing that appears to the contrary, Jenkins may have vested in himself all the securities that the other incumbrancers held, and, therefore, did every thing that he intended to do. When neither Mansell nor his representatives require the trust to be performed, what right can Mrs. Biou have to do so? How can it concern her to know who are the persons entitled to this estate? If Jenkins had tendered the principal and interest due on the mortgages, could she have refused to receive it, and insisted upon his executing all the trust? She and all the other incumbrancers have no interest in the estate except to see themselves paid. At all events, by continuing to receive the interest for so long a period, she has precluded herself from disputing the plaintiffs' right to redeem.

Mr. *Sugden*, and, Mr. *Wakefield*, for the defendants:—From what fell from the Lord Chancellor when this cause was before him, (b) it is clear that the impression \*on his lordship's mind was, that it is not [\*605] sufficient, for a person coming to redeem a mortgaged estate, to say that he had got a conveyance of it as a trustee; but that the mortgagee had a right to hold the estate until a right to redeem it was shown. No attempt has ever been made to carry the trusts of the indentures of July 1781 into

(b) See 3 Swan. 237.

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 1826.—James v. Biou. Owen v. Flack.
 

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execution. It is now forty-four years since those trusts were created, and they have all long since ceased. If those who now represent Jenkins mean to enforce their claim, they ought to have brought the *cestui que* trusts before the court. This is not a question between the real owners of the estate, but the claim is made by persons deriving their title under a mere naked trustee. If any person has a right to redeem this estate, that right must be vested in one of the Mansell family.

The VICE-CHANCELLOR :—This bill is filed by the plaintiffs for the purpose of redeeming two mortgages, now vested in the defendant. The title of the plaintiffs to redeem these mortgages is founded upon a conveyance, made in July, 1781, by Sewell Mansell (whom the plaintiffs assert to have been then well entitled in fee-simple to the equity of redemption of the mortgaged property) to Abel Jenkins and his heirs, upon trust to sell, and pay off certain charges and incumbrances, including the mortgages in question, and to pay the surplus of the produce of the sale to Sewell Mansell, his executors and administrators.

The defendant admits that Sewell Mansell had some interest in the equity of redemption at the time of this conveyance, but is ignorant what the nature of that interest was ; and calls upon the plaintiffs to prove that he had [\*606] good title to convey in fee, according to the \*deeds of July 1781 ; and the defendant contends that, admitting Sewell Mansell had good title to convey in fee according to the deeds of July 1781, yet that the plaintiffs have now no right of redemption. Two of the original plaintiffs were devisees in trust, and executors under the will of Abel Jenkins, and the other plaintiff is the heir at law of Abel Jenkins. In order to prove the title of Sewell Mansell to make the conveyance in question, the plaintiffs do not read the qualified admission in the answer of the defendant, but produce certain receipts, signed by the defendant, for interest money paid to her upon her mortgages, in which, for four years prior and down to 1781, she acknowledges to have received the interest of Mr. Mansell by the hands of Mr. Jenkins ; and, in two of such receipts, it is stated to be for interest due on mortgage of his estate. The defendant alleges that these receipts were written by Mr. Jenkins, who acted as steward of the mortgaged estates, and that, being satisfied with the regular payment of the interest, she did not enter into any critical examination of the language, but readily signed the receipts as they were produced to her.

If a person pays money to another, it must be presumed that the person paying has inquired into and is satisfied with the title of the receiver, and the fact of payment is, therefore, evidence against the payer of the title of the receiver. But a person not paying, but receiving payment in respect of a just demand, may well assume, without inquiry, that the person who ten- [\*607] ders the \*money in payment, is legally bound to pay it ; and the fact of receipt is not, therefore, the same evidence of the title of the payer, as the fact of payment was, in the other case, of the title of the receiver.

It is further to be observed that the receipts given by the defendant to Abel

1826—James v. Biou. Owen v. Flack.

Jenkins, from the execution of the deeds of 1781 until his death in 1802, though admitted to be in possession of the plaintiffs, are not produced; and the suppression of them is evidence that these receipts afford inferences unfavorable to the title of the plaintiffs. The receipts after the death of A. Jenkins, state the interest to have been received from his executors. But, under the conveyance of 1781, the trusts descended to his heir at law; and the receipts, if they had been conformable to the title, would have expressed that the interest was paid by the heir at law. In the particular case, therefore, the language of the receipts is not to be relied upon.

But the defendant further objects, as I have stated, that, admitting Sewell Mansell to have had good title to make the conveyance of 1781 to Abel Jenkins, yet the plaintiffs have now no right of redemption under it. At law, the plaintiffs, or one of them, as owners of the fee, would have all the rights incident to the quality of their estate, and, consequently, the rights to redeem the defendant's mortgages. But, in equity, the plaintiffs, being trustees, have only such rights of property as are expressly given to them, or are required for the execution of their trusts.[1] The plaintiffs, in the bill, state that all the charges and incumbrances intended to be provided for by the sale of the estate in 1781, are either extinct by the death of the annuitants, or have been satisfied from the rents and profits, except the mortgages due to the defendant. [\*608] And such charges of the trustee as may have arisen in the execution of the trust, without stating that any such charges have arisen. It is now nearly forty-five years since this trust was created, and never having yet been executed, and the principal purpose of the sale answered without it, it must be presumed that the intention of the trust has long been abandoned by those who are now interested in the estate, and such persons are not made parties to the suit in order to sustain the right of redemption.[2] It might be difficult to make out how the redemption of these mortgages would be a necessary act in the execution of the power of sale, if the trusts subsisted. But, if the trusts are to be presumed to be determined, and the plaintiffs have no power of sale, then, consequently, they can have no power of redemption, which they could only claim as ancillary to the power of sale.

Bill dismissed, with costs.

[1] No person can come into a court of equity for the redemption of a mortgage, unless he is entitled to the estate of the mortgagor, or claims a subsisting interest under it; *Grant v. Duane*, 9 Johns. Rep. 591; *Douglas v. Sherman*, 358.

[2] When lapse of time is a bar to the equity of redemption, see *Moore v. Cable*, 1 Johns. Ch. Rep. 385; *Marks v. Pell*, id. 594; *Hughes v. Edwards*, 9 Wheat. 489; *Wells v. Morse*, 11 Verm. Rep. 9; *Ross v. Norvall*, 1 Wash. 14; *Lamar v. Jones*, 3 Harr. & McHon. 328; *Skinner v. Smith*, 1 Day, 124.

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1826.—*Vansittart v. Collier.*

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## VANSITTART v. COLLIER.

1826, 29th July.—*Practice.*—*Opening biddings.*

A purchaser who has confirmed his report *nisi*, and then is served with a notice of motion to open the biddings, cannot confirm his report absolutely.

A PURCHASER obtained the order *nisi* for confirming his report. Before the report was actually confirmed he was served with notice of a motion for opening the biddings, and nevertheless proceeded to confirm his report. The court was now moved to discharge the order for confirmation, and the Vice-Chancellor discharged it accordingly, on the authority of a case of *Watson v. Brickwood*, 6th February, 1808, with which he had been furnished by Mr. Walker, the registrar.

# INDEX.

## ACCOUNT.

Where the plaintiff filed his bill for an account of the captain's profits of a voyage to India in one of the company's ships, to a share of which the plaintiff was entitled under an agreement with the captain, and it was alleged by the captain's executors that the agreement was made in consideration of the plaintiff having procured for the captain the command of the ship, this court directed an issue to ascertain the consideration, reserving the question whether such an agreement would or not be void. *Money v. Macleod*, 301

## ADMINISTRATION.

1. Where a partner dies leaving the partnership accounts unsettled, the ecclesiastical court will grant administration of his effects to the surviving partners, or any persons claiming under them, if his next of kin decline it. *Cawthorn v. Chalie*, 127
2. A testator resident in India, and having all his property there, bequeathed his residuary estate to H. L.; but if she should die before him, then to her children. H. L. died before the testator and the executor, who was also resident in India, proved the will there, and remitted the residue to his agent in England, with directions to pay it to H. L. or her children. A suit having been instituted by the children, who were infants, against the executor and his agent to have the residue secured, held that the legacy duty was payable upon it, and that administration to the testator ought to have taken out in this country, and the administrator made a party to the suit. *Logan v. Fairlie*, 284

See ASSETS.

## ADVANCEMENT.

A father lent a sum of money to his son to enable him to engage in trade, and took his promissory note for it, and afterwards persuaded his son to continue the trade against his inclination, whereby the son suffered great losses. The father on his death-bed caused the promissory

note to be burned, and died intestate: held that the burning of the note amounted in equity to a release of the debt, and that the sum which remained due upon it was an advancement to the son. *Gilbert v. Wetherell*, 254

## AGREEMENT.

1. In order to constitute an agreement by letters the answer to the written proposal must be a simple acceptance of the terms proposed without the introduction of any new or different term. *Holland v. Eyre*, 194
  2. A tenant for life of real estate, with remainder to his children, as he should appoint remainder to them in fee, entered into an agreement with a creditor, to which his children were parties; that the estate should be immediately sold, and one half of the produce paid to the father, and the other half to the children. The father remained in possession for seven years, and then died without having taken any step to carry the agreement into effect. A bill by the personal representative of the creditor against the children and representative of the father to have the agreement carried into effect, was dismissed on the ground that the father, by continuing in possession of the estate, deprived his daughter of the benefit of the agreement. *Rhodes v. Cook*, 488
- See ACCOUNT. CHAMPERTY. HUSBAND AND WIFE, 4. SPECIFIC PERFORMANCE, 5.

## AMENDMENT.

Plaintiff by his original bill sought to set aside a deed. After the answer was filed he, under the usual order, amended the bill by making quite a different case, and sought to establish the deed. The court ordered him to pay the costs of the original bill, and of certain accounts set forth in the answer, in compliance with the prayer of that bill, and the costs of the motion. *Mavor v. Dry*, 113

See PRACTICE, 2. COSTS, 3.

## ANNUITY.

Unless a defect in the memorial of an annuity is



stated in the pleadings or evidence, no advantage can be taken of it. *Dunn v. Calcraft*, 56

### ANSWER.

1. An answer as to matters to which the defendant was not alleged to be privy, that they might be true for any thing he knew to the contrary, followed by an averment that he was a stranger to and could not form any belief respecting them, is sufficient. *Amhurst v. King*, 183
  2. The bill alleged that a bill of exchange held by the defendant was an accommodation bill and required him to set forth the particulars of the consideration pretended to be given for it; the answer denied the allegation, and stated that the bill of exchange was paid to the defendant in the regular course of his business as a banker, and that the consideration did not consist of any specific sum, but of cash from time to time drawn out by the payer: held that this was a sufficient answer, and that it would have been impertinent in the defendant to set forth the general banking account. *Webster v. Threlfall*, 190
  3. A defendant may file a further answer before the master has signed his report as to the insufficiency of the first answer. *Wynne v. Jackson*, 226
  4. A defendant cannot, by answer, protect himself from answering fully, on the ground of his being a purchaser for valuable consideration.
  5. Where a plaintiff takes no exception to the answer to the original bill, he cannot take an exception to the answer to the amended bill, upon a principle which would have applied equally to the answer to the original bill. *Ocey v. Leighton*, 234
  5. Exceptions to an answer, containing in substance, but not verbatim, the interrogatories not answered will be overruled; but if the defendant has submitted to answer, and his further answer is referred back, he is too late to object to the form of the exceptions. *Hodgson v. Butterfield*, 236
  6. Fourteen directors of a joint stock company, against whom a bill was filed by a shareholder in the company for an account and dissolution of the concern, having filed fourteen separate answers, with long schedules to each, each of the answers and schedules being nearly verbatim the same, and the defendants appearing all by the same solicitor, who had threatened to ruin the plaintiff by the costs of the suit; the court directed a reference to the master to ascertain whether it was necessary or expedient, with a view to the defence, that separate answers should have been filed. *Vaneandau v. Moore*, 509
- See Commission, 1.

### APPEAL.

No appeal lies to the court of chancery from the decisions either of the privy council or of the commissioners under the acts and conventions for indemnifying British subjects for the confiscation of their property by the French revolutionary government. *Hill v. Reardon*, 431

### APPEARANCE.

If a person who is named as a defendant, but has never been served with a subpoena, or appeared to the bill appears by counsel at the hearing and consents to be bound by the decree, the defect is cured. *Capel v. Butler*, 457

### APPOINTMENT.

Where a power was to be executed by a will signed and published in the presence of, and attested by three witnesses: held that a will concluding with this declaration, "This is my last will and testament," and expressed to be signed by the testatrix in the presence of the three attesting witnesses, was not a good appointment, because the publication was not attested. *Stanhope v. Keir*, 27

See Portions.

### APPORTIONMENT.

The lord of a manor being seised of it in fee, subject to an executory devise over, purchased an estate, partly freehold and partly copyhold, of the manor, and afterwards under an inclosure act, carried in two claims, one in respect of the devised, and the other in respect of the purchased estate, and obtained two allotments accordingly. He afterwards died, and the executory devise took effect; held that the copyhold part of the purchased estate being extinguished in the manor, passed with it to the executory devisee, who was also entitled to so much of the allotment obtained in respect of the purchased estate as was proportionate to the value of the copyhold part; and it was referred to the master to apportion the allotment accordingly. *King v. Moody*, 579

### ASSETS.

An executor or administrator may, after a suit is instituted against him for an account, pay any simple contract or specialty creditor, and will be allowed such payment in passing his accounts. *Moltes v. Russell*, 227

### ATTACHMENT.

A plea may be filed after the return of a simple attachment. *Hamilton v. Hibbert*, 225

### AUCTIONEER.

If an action is brought against an auctioneer for a deposit, he cannot file a bill of interpleader if he insists upon retaining either his commission or the duty. *Mitchell v. Hayne*, 63

### AWARD.

1. The court will enforce an award made under an order of reference by consent in a cause; and it makes no difference that it is a part of the order that the parties should execute arbitration bonds. It is not necessary to make such an award a rule of court. *Marquess of Ormond v. Kynnersley*, 15
2. An award made under an agreement entered into after a bill is filed to refer the whole subject-matter of the suit to an arbitrator, may be pleaded to the bill. But where all the parties

to the suit were not parties to the award (although the plaintiff was a party to it,) and where part of the prayer of the bill was for the execution of the trusts of a deed under which some of the parties to the suit were interested who were not parties to the award, a plea of the award was ordered to stand for an answer, with liberty to except. *Dryden v. Robinson*, 529  
See SPECIFIC PERFORMANCE, 2, 5. REFEREE.

### BANKRUPT.

1. Where a mortgagee becomes bankrupt, and a bill of foreclosure is filed against him and his assignees the court will not, on the application of the assignees alone make an immediate decree under 7 Geo. 2. c. 20. *Garth v. Thomas*, 188
2. To a bill by assignees of a bankrupt against a creditor, a plea that the suit was not instituted with the consent of the creditors at a meeting pursuant to the 5th Geo. 2. c. 30. s. 38. was allowed. *Ockelstone v. Benson*, 265
3. The directors of a company assigned their salaries and shares to the company to secure debts due from them on their private accounts, and empowered the company to direct the treasurer to retain their salaries and dividends, and sell their shares for payment of their debts; one of the directors became bankrupt, but the power given to the company had not been exercised, and his shares still remained in his name: held that they passed to his assignees as being in his order and disposition, but that the company had a right to set off against the bankrupt's debt, the dividends and salary due to him at his bankruptcy. *Nelson v. The London Assurance Company*, 292
4. A lease was granted to W. who afterwards committed an act of bankruptcy and then executed a declaration of trust in favor of R., on the trial of an issue directed by the court it was found that W.'s name was used in trust for R.: held that the lease did not pass to W.'s assignees. *Gardner v. Rowe*, 316
5. An order obtained by a defendant to a bill of discovery for payment of his costs is regular, although the plaintiff had previously become bankrupt. *Hibberson v. Fielding*, 371  
See DISMISSAL OF BILL.

### BIDDINGS.

A purchaser who has confirmed his report nisi, and then is served with a notice of motion to open the biddings cannot confirm his report absolutely. *Vanantart v. Collier*, 608

### BOND.

A bond for securing a provision for a woman, who had been seduced by the obligor, and for her children, given after cohabitation determined is good, notwithstanding the obligor was married when the connexion commenced. *Knye v. Moore*, 260

### CERTIORARI.

Plaintiff had removed the proceedings in a replevin from a county court in Wales to the court of great sessions, and then applied to this court for a certiorari to remove them into

the king's bench, the court granted the writ, without requiring the plaintiff to show any special ground for it. *Edwards v. Bowen*, 514

### CHAMPERTY.

Where a creditor who had instituted proceedings at law and in equity against his debtor, enters into an agreement with the debtor to abandon those proceedings, and give up his securities in consideration of the debtor giving him a lien on securities in the hands of another creditor, with authority to sue such other creditor, and agreeing to use his best endeavors to assist in adjusting his accounts with the holder of the securities, and in recovering his securities: held that the agreement does not amount to champerty, but would have done so if it had stipulated that the creditor should maintain the proceedings instituted by the debtor against the holder of the securities, in consideration of the profits to be derived by the debtor from the suit. *Hartley v. Russell*, 244

### CHARITY.

1. The court has no jurisdiction under the 52d Geo. 3. c. 101, to direct, upon petition, an account of the assets of a person who had received the rents of a charity estate. *In the matter of St. Wenn's Charity*, 66
2. Where a common was enclosed under an act of parliament passed with the consent of the proprietors, and was vested in commissioners upon trust to apply the rents for the improvement of a town with power to them to levy a rate on the inhabitants in case the rents proved deficient, an information and bill being filed by some of the inhabitants on behalf of themselves and the others, against the commissioners for an account of the rents, alleging misapplication, and that a rate levied was unnecessary: held, on general demurrer, first that the funds constitute a charity, and second that the object of the suit being to avoid the rate, the plaintiffs had a right to sue on behalf of themselves and the other inhabitants. *The Attorney General v. Heelis*, 67
3. Bequest to the widows and orphans of the parish of L.: held a good charitable bequest. *Attorney General v. Comber*, 93
4. Where a testator gives a sum of stock to trustees, and shows a clear intention to dispose of the whole of the dividends for the benefit of charitable institutions, and does in fact specify some of them, and the yearly sums to be paid to them, but leaves blanks for the names of others, and for the sums to be paid to them; the court will refer it to the master to approve of a scheme for the application of the remaining dividends. *Pieschel v. Paris*, 384
5. A corporation which was bound to pay, out of the revenues of charity lands, a certain annual sum to a college, in the 4th of James the First, conveyed to the college lands then of that annual value in satisfaction of the annual sum. The lands so conveyed by accidental circumstances, became of much greater value in proportion than the lands which were reserved by the corporation for the other purposes of the charity; yet the court will not at this day undo an arrangement which was fair at the time, and had the approbation of the executor of the

founder. *Attorney General v. Pembroke Hall*, 441

6. A devise to the British Museum is within the statute of mortmain; and so is every devise for a public purpose, whether local or general. *Trustees of the British Museum v. White*, 594

See JURISDICTION, 2.

### COMMISSION.

1. It is not irregular for the defendant's solicitor to be one of the commissioners for taking the answer. *Bird v. Branker*, 186
  2. Where a schedule written on paper was returned with a commission of partition, the plaintiff's clerk in court was allowed to engross it on parchment, and to file the engrossment with the return, in analogy to the practice where foreign depositions are returned on paper. *Jones v. Totty*, 219
  3. A motion for a commission to examine a witness abroad, in aid of an action at law, must be supported by an affidavit, stating the name of the witness and the points to which he is to be examined. *Mendizabel v. Machado*, 463
- See MULTIPARTISNESS.

### COMPENSATION.

Surveyors appointed to make a partition between tenants in common having by mistake allotted to one of them a piece of land which belonged to him exclusively, and several of the allotments having been sold before the mistake was discovered, the court decreed a pecuniary compensation to be made to him. *Dacre v. Gorges*, 454

### CONDITION.

1. Devise of an estate to trustees upon trust to pay the rents and profits to the testator's son I. while unmarried, and to convey to him in case of his marriage with the consent of the trustees; but in case he should marry against their consent, then to sell the estate and divide the proceeds among other persons. The son having married without the knowledge of the trustees, both of whom disapproved of the marriage when they were informed of it: held, that the marriage having been had without the consent of the trustees, though not against their consent, the devise over took effect. *Long v. Ricketta*, 179
2. Bequest to M. on the day of her marriage with any other person than I and if she married I. then over. M. married I. in the lifetime, and with the consent of the testator: held that she was entitled to her legacy. *Smith v. Cowdery*, 358

### CONDUCT OF CAUSE.

See SOLICITOR, 2.

### CONSTRUCTION.

1. By the settlement on the marriage of J. H. with C. R. portions were to be raised for the younger children of J. H. by C. R. or any future wife but not to be paid until after the decease of J. H., C. R., or such future wife, though no estate was given to such future wife; and power was given to J. H. to appoint the inte-

rest of the portions to be raised for the children's maintenance, and on his default the same power was given to the trustees, and the maintenance was directed to be paid on the first quarter day after the decease of the survivor of J. H., C. R., or such future wife. J. H. died, leaving his second wife surviving, and by his will, which was not duly attested, directed the maintenance to be raised from the time of his death, and gave other benefits to his eldest son: held that the trustees had no power to allow maintenance during the second wife's lifetime, but that the eldest son should be put to his election, as he had other benefits under the will, and was the only party that could be benefited by withholding the maintenance. *Hume v. Knudell*, 174

2. Devise of freeholds and leaseholds to A. for life, and after his decease to the heirs of his body, their heirs, executors, &c. gives A. an estate tail in the former, and the absolute interest in the latter. *Kinch v. Ward*, 409
3. Legacy to A. as soon as she attains twenty-one, with interest, is contingent, and no interest is payable until the legatee attains twenty-one, and then is to be computed from the end of a year after the testator's death. *Knight v. Knight*, 490

4. Residuary devise of real and personal estate to all the issue, child or children, of M. F. as should be alive at the time of the decease of the survivor of two successive tenants for life, equally, amongst them; if more than one, to be divided share and share alike, when and as they should respectively attain the age of twenty-four years, and to their respective heirs, executors, administrators and assigns, for ever, as tenants in common: held, that the children living at the death of the tenants for life, took absolute vested interests in the personal as well as the real estate. *Farmer v. Francis*, 505
5. Testatrix directed her legacies to be paid by her executor, to whom she afterwards gave all her real estates, and the residue of her personal estates, after payment of her debts and funeral expenses: held that the legacies were not charged on the real estates. *Parker v. Fernley*, 592

See COPYHOLD, 1, 2. CONVERSION, 1. DEVISE, 8. LEASEHOLD, LEGACY, 3, 5, 6, 7, 9, 10. MONTH SETTLEMENT.

### CONTEMPT.

Giving a notice of trial is a breach of an injunction to stay trial. *Bird v. Branker*, 186

### CONVERSION.

1. Testatrix devised all her messuages, lands, tenements, hereditaments and real estate to trustees in trust to sell, and out of the produce to pay her funeral and testamentary expenses and legacies, except her charitable legacies which she directed to be paid out of her personal estate legally applicable to that purpose, and not out of any part of her said messuages, lands, &c. which she might die seized or possessed of, and she also directed her trustees to keep separate accounts of the proceeds of her messuages, &c. and of her personal estate legally applicable to charitable purposes, and that if the proceeds of her messuages, &c. should be insufficient to pay the legacies directed to be

paid therewith, the trustees should apply her personal estate in payment of such legacies: held, 1st. that notwithstanding the personal estate was more than sufficient to pay the charitable legacies, no part of it could be applied to pay the other legacies until the proceeds of the real estate were exhausted; 2d. that the testatrix's leaseholds passed to the trustees under the devise of all her messuages, &c; 3d. that her heir and next of kin, and not her residuary legatees were entitled to the surplus proceeds of her freeholds and leaseholds; and 4th. that the freeholds having been properly sold in the heir's life-time, the surplus was part of his personal estate. *Dixon v. Dawson*. *Slawin v. Furside*, 327

2. Where a mortgage deed contains a power of sale, with a direction that the surplus produce shall be paid to the mortgagor, his executors and administrators, if a sale takes place in the life time of the mortgagor, the surplus is personal estate, but if after his death, it is real estate. *Wright v. Rose*, 323

### COPYHOLDS.

1. Testator having surrendered some of his copyholds to the use of his will, and left others unsurrendered, devised all his copyhold messuages, lands, &c. whatsoever, and wheresoever, and which he had surrendered to the use of his will: held that the unsurrendered as well as the surrendered estates passed by the will. *Strutt v. Finch*, 229
2. Devise of "all my freehold and copyhold messuages, &c. the copyhold parts thereof having been duly surrendered to the uses of this my will," passes unsurrendered, as well as surrendered copyholds. *Oxenforth v. Cawkwell*, 538
3. The lord of a manor being seised of it in fee, subject to an executory devise over, purchased an estate partly freehold and partly copyhold of the manor, and afterwards under an inclosure act carried in two claims, one in respect of the devised, and the other in respect of the purchased estate, and obtained two allotments accordingly; he afterwards died, and the executory devise took effect: held that the copyhold part of the purchased estate being extinguished in the manor, passed with it to the executory devisee, who was also entitled to so much of the allotment obtained in respect of the purchased estate as was proportionate to the value of the copyhold part; and it was referred to the master to apportion the allotment accordingly. *King v. Moody*, 579

### COPYRIGHT.

Copyright may be either in respect of the matter or the arrangement; but no property can be acquired in an article copied from a prior work. *Burfield v. Nicholson*, 1  
See INJUNCTION, 8.

### COSTS.

1. A bill filed by a solicitor on instructions furnished by the brother-in-law of the plaintiff without any communication with the plaintiff himself, being dismissed with costs; the solicitor ordered to pay the costs, it appearing that

the plaintiff had absconded before the bill was filed. *Hall v. Bennett*, 78

2. Where a decree orders the defendant to retain his costs when taxed out of the balance in his hands, and pay the residue into court; if the defendant delay to get the costs taxed, the plaintiff must move that he may bring in his bill of costs to be taxed within a limited time, and not that he may pay in the whole balance. *Newsome v. Shearman*, 95
3. Plaintiff, by his original bill, sought to set aside a deed: after the answer was filed, he, under the usual order amended the bill by making quite a different case, and sought to establish the deed. The court ordered him to pay the costs of the original bill, and of certain accounts set forth in the answer in compliance with the prayer of that bill, and the costs of the motion. *Mavor v. Dry*, 113
4. If the master reports against the title to an estate purchased under a decree, the purchaser will be paid the costs of the reference out of the funds in the cause. *Reynolds v. Blake*, 117

5. Where a legacy is charged upon land, and the price of the land is insufficient to pay the legacy, a mortgagee of the devise of the land shall not be allowed his costs in a suit against him, and the devisee for payment of the legacy. *Shackleton v. Shackleton*, 242
6. A purchaser under a decree is entitled to his costs where the master reports against the title, although there is no fund in court. *Smith v. Nelson*, 557
7. An order obtained by a defendant to a bill of discovery for payment of his costs is regular, although the plaintiff had previously become bankrupt. *Hiberson v. Fielding*, 371
8. Creditor proceeding at law against the executor after a decree, allowed his costs at law incurred previous to notice of the decree, but not his costs of the motion to restrain his proceedings. *Anonymous*, 424
9. If a bill of costs is taxed after the solicitor's death his representative will not be ordered to pay the costs of taxation, although more than a sixth is deducted. *In re Cole*, 463

### COVENANT.

The reversioner of leaseholds, with the privity of the tenant for life, renewed the lease in his own name, and covenanted to repair the premises: held that he was to be considered as having entered into the covenant on behalf of the tenant for life, and that the latter's estate was liable for dilapidations occasioned by his neglecting to repair. *Mursh v. Wells*, 87

### CREDITOR'S SUIT.

Where a plaintiff files a bill on behalf of himself and all other persons of the same class, he retains the absolute dominion of the suit until the decree, and may dismiss the suit at his pleasure; but after the decree he cannot deprive the other persons of the same class of the benefit of the decree, if they think fit to prosecute it. *Handford v. Storie*, 196  
See DEBTOR AND CREDITOR, 1, 5.

### CROSS-BILL.

See DEBTS, 1.

## DEBTOR AND CREDITOR.

1. A bill to carry the trusts of a creditor's deed into execution may be filed on behalf of all the creditors by one of them only where they all executed the deed, but were very numerous. *Weld v. Bonham*, 91
2. A father lent a sum of money to his son to enable him to engage in trade, and took his promissory note for it, and afterwards persuaded his son to continue the trade against his inclinations, whereby the son suffered great losses. The father on his deathbed caused the promissory note to be burned and died intestate: held that the burning of the note amounted in equity to a release of the debt, and that the sum which remained due upon it was an advancement to the son. *Gilbert v. Wetherell*, 254
3. Creditor proceeding at law against the executor, after a decree, allowed his costs at law incurred previous to notice of the decree, but not his costs of the motion to restrain his proceedings. *Anonymous*, 421
4. If by the neglect of the creditor the benefit of some of the securities for the debt is lost, the surety is *pro tanto* discharged. *Capel v. Butler*, 457
5. A creditor who had filed a bill on behalf of himself, and all other creditors, against trustees to whom estates had been conveyed for payment of the debts, having, in consideration of payment of his debt by an agent of the debtor, dismissed the bill before any decree, although he was paid out of the trust fund; a bill filed by another creditor, on behalf of himself and all other creditors, against the plaintiff in the first suit and the trustees for recovery of the sum paid to him, was dismissed with costs, it appearing that the trustees gave no authority for the payment out of the trust fund, and that he did not know that he had been paid out of that fund. *Handford v. Storie*, 196
6. A debtor to a testator cannot maintain a bill against the personal representative, to obtain the directions of the court as to the disposal of the money due by him, and to restrain an action, brought by the personal representative, to recover the debt, on the ground that the debt had been appropriated by the testator for a particular purpose, and that the personal representative intended to apply it for purposes not warranted by the will. *Darthez v. Winter*, 536
7. An annuity of 200*l.* was bequeathed to A. provided he paid 2,000*l.* due to the testator; but if he paid 1,000*l.*, then an annuity of 100*l.* with a recommendation to the executor to lean on the side of mercy, and to be liberal to him. A. paid off 1,400*l.*, the executor (who was also residuary legatee) paid the annuity of 200*l.* during his life, and waived in writing, but did not formally release, the remainder of the debt; his executor may withhold the annuity until the remainder of the debt is paid. *Semble. Hemmings v. Gurrey*, 311  
See SATISFACTION, 2.

## DECREE.

1. Where a plaintiff files a bill on behalf of him-

self and all other persons of the same class, he retains the absolute dominion of the suit until the decree, and may dismiss the bill at his pleasure; but after the decree he cannot deprive the other persons of the same class, of the benefit of the decree, if they think fit to prosecute it. *Handford v. Storie*, 196

2. Where, by mistake, sums paid into court under the decree were included in the balances reported due from the defendant, and the decree on further directions ordered those balances to be paid into court: held that the mistake could not be rectified without rehearing the cause on the latter decree. *Brookfield v. Bradley*, 64  
See APPEARANCE.

## DEEDS.

1. Production of an instrument in the plaintiff's possession ordered upon motion, supported by affidavit, that the defendant believed the instrument to be forged, and that he could not fully answer the bill before he inspected it. *Jones v. Lewis*, 242
2. If a bill is filed to set aside a conveyance on the ground of fraud, the court will not on motion, order a production of the conveyance. *Tyler v. Drayton*, 309

## DEFENDANT.

Ordered, that a defendant a female infant not baptized, should be described in the subpoena as the youngest female child of the father and mother. *Eley v. Broughton*, 188  
See ANSWER, 4. APPEARANCE. WITNESS.

## DEMURRER.

A defendant against whom an attachment had issued for want of an answer, tendered the costs of the contempt, and then filed a demurrer. The demurrer was ordered to be taken off the file. *Mellor v. Hall*, 321  
See MULTIFARIOUSNESS. PARTIES, 3.

## DEPOSITIONS.

The court will not, on motion, order depositions in a tithe cause in the exchequer, to be read in a tithe suit in this court, against other occupiers of land in the same parish, though the objects of both suits and the interest of the parties were the same. *Goodenough v. Alway*, 451

## DEVISE.

1. Devise of an estate to trustees upon trust to pay the rents and profits to the testator's son I., while unmarried, and to convey to him in case of his marriage, with the consent of the trustees, but in case he should marry against their consent, then to sell the estate, and divide the proceeds among other persons. The son having married without the knowledge of the trustees, both of whom disapproved of the marriage when they were informed of it: held that the marriage having been had without the consent of the trustees, though not against their consent, the devise over took effect. *Long v. Ricketta*, 179

2. Where real estate is devised, subject to debts and legacies, and the devisee is also executor, a purchaser or mortgagee from him of the real estate is liable to the charge, if the circumstances of the transaction afford intrinsic evidence, that the mortgage or purchase money was not to be applied for the debts or legacies. *Watkins v. Cheek*, 199
3. Testator having surrendered some of his copyholds to the use of his will, and left others unsurrendered, devised all his copyhold messuages, lands, &c., whatsoever and whosoever, and which he had surrendered to the use of his will: held that the unsurrendered as well as the surrendered estates passed by the will. *Strutt v. Finch*, 229
4. Testator directed his real and personal property to be sold and divided amongst his sisters, a power to the executors to sell the real property was implied. *Tylden v. Hyde*, 238
5. Testator directed his residuary estate to be laid out in the purchase of land as soon as a convenient purchase could be found in the county of York, which upon a fair letting would produce a yearly rent equal to three and a half per cent. upon the amount of purchase money, and in the mean time the interest of his residuary estate to be accumulated. The tenant for life will be entitled to the interest of the residuary estate, from the end of one year after the testator's death until it is laid out as directed. *Kilvington v. Gray*, 396
6. Devise of freeholds and leaseholds to A. for life, and after his decease to the heirs of his body, their heirs, executors, &c. gives A. an estate tail in the former, and the absolute interest in the latter. *Kinch v. Ward*, 409
7. Devise of copyhold land in fee upon condition that the devisee within one month pay 2,000*l.* to the executor, to be applied for charitable purposes, the testator having left no customary heir, and no next of kin. Held that the devisee took the land subject to the payment of the 2,000*l.*, and that the crown (and not the lord of the manor,) was entitled to the 2,000*l.* by prerogative, if personal estate, because there was no next of kin; and if real estate, because there was no customary heir. *Henchman v. The Attorney General*, 498
8. Testator devised his estates at S. and H. to trustees, in trust, if there should be only one son of D. who should attain twenty-one for that son, and in case there should be two or more such sons, in trust for the second of them, and gave all the residue of his estates to trustees in trust to sell. He afterwards drew his pen through the trust to sell, and, by a codicil, declared that he intended to erase the direction to sell only; he then gave all his estates to the son of D. who should first attain twenty-one, and change his name to E. D. at the death of the testator had a son who was still an infant, and afterwards had another son: held that the codicil revoked the devise of the S. and H. estates, and also the devise of the residue of the estates to the trustees; and that D.'s eldest son took under this codicil an immediate vested interest, both in the estates of which the testator was seized at the date of his will, and those he purchased afterwards, and consequently was entitled to the rents during his infancy. *Duffield v. Elwes*, 544

9. Devise of "all my freehold and copyhold messuages, &c. the copyhold parts thereof having been duly surrendered to the uses of this my will," passes unsurrendered as well as surrendered copyholds. *Oxenforth v. Cawkwell*, 558

See CONSTRUCTION, 4, 5. LEASEHOLDS.

### DISCOVERY, BILL OF.

An order obtained by a defendant to a bill of discovery for payment of his costs is regular, although the plaintiff had previously become bankrupt. *Hibberson v. Fielding*, 371

### DISMISSAL OF BILL.

The time for dismissing the bill for want of prosecution being arrived, and the plaintiff having become bankrupt, ordered that the bill be dismissed without costs, unless the assignee file a supplemental bill within three weeks. *Sharp Hullett*, 496

See DECREE, 1. PRACTICE, 18, 20, 30.

### ELECTION.

1. By the settlement on the marriage of J. H. with C. R. portions were to be raised for the younger children of J. H. by C. R. or any future wife, but not to be paid until after the decease of J. H., C. R., or such future wife, though no estate was given to such future wife, and power was given to J. H. to appoint the interest of the portions to be raised for the children's maintenance, and on his default the same power was given to the trustees, and the maintenance was directed to be paid on the first quarter-day after the decease of the survivor of J. H., C. R., or such future wife, J. H. died leaving his second wife surviving, and by his will, which was not duly attested, directed the maintenance to be raised from the time of his death, and gave other benefits to his eldest son: held that the trustees had no power to allow maintenance during the second wife's life-time, but that the eldest son should be put to his election, as he had other benefits under the will, and was the only party that could be benefited by withholding the maintenance. *Hume v. Rundell*, 174

2. Where it was not apparent on the face of the will, that a general devise in trust to sell was intended to include a particular estate, of which the testatrix had been wrongfully in possession up to the time of her death, the rightful owner of that estate is not put to his election in respect of an interest bequeathed to him in the money to be produced by the sale of the estate. *Blommar v. Player*, 597

See EQUITY. DEBTOR AND CREDITOR, 6. SPECIFIC PERFORMANCE, 5.

### EQUITY OF REDEMPTION.

Trustee in receipt of the rents and profits of a mortgaged estate, under an old conveyance of the equity of redemption, upon trust to sell and pay off certain debts which had been long since satisfied, is not entitled to redeem the mortgage. *James v. Biou. Owen v. Flack*, 600

See HUSBAND AND WIFE, 1. MORTGAGE, 8.

## ESCHEAT.

Devise of copyhold land in fee upon condition that the devisee within one month pay 2,000*l.* to the executor, to be applied for charitable purposes, the testator having left no customary heir, and no next of kin: held that the devisee took the land, subject to the payment of 2,000*l.* and that the crown and not the lord of the manor was entitled to the 2,000*l.* by prerogative; if personal estate, because there was no next of kin, and if real estate, because there was no customary heir. *Henchman v. The Attorney General*, 498

## ESTOPPEL.

A conveyance by lease and release will operate as an estoppel, and where the releasee can have the benefit of the conveyance at law, this court will not interfere in his behalf. *Bensley v. Burdon*, 519

## EVIDENCE.

1. The custody from which a document offered in evidence is taken, cannot be proved by an interested person.

The plaintiff represented himself in his bill as entitled to the tithes of the parish of B. without noticing a district called H. which was part of the parish, but had of late years been considered as a distinct parish. At the trial of issues as to certain moduses in B., the plaintiff proved that H. was part of B., and that the moduses did not prevail in H.; the verdict was however in favor of the moduses. A motion by the plaintiff for a new trial was refused, because the evidence as to H. was a surprise upon the defendant, and was calculated to defeat the intention of the court in directing the issues. *Carrington v. Jones*, 135

2. It is not necessary for a plaintiff who claims an estate as tenant in tail under the marriage settlement of his father and mother, to prove their marriage by affidavit before he shows cause against dissolving an injunction to restrain an ejectment brought against him to recover the estate. *Hodgson v. Dean*, 221

3. Payment of money, though evidence against the payer of the title of the party receiving it, is not evidence against the receiver that the payer was the party bound to pay it. *James v. Bion. Owen v. Flack*, 600

4. The suppression of some of a series of documents relating to the title, which are admitted to be in the possession of a party, is evidence that the documents withheld afford inferences unfavorable to the title of the party who withholds them. *Ibid.*

## EXCEPTIONS.

Where a plaintiff takes no exception to the answer to the original bill, he cannot take an exception to the amended bill, upon a principle which would have applied equally to the answer to the original bill. *Ocey v. Leighton*, 234

2. Exceptions to an answer containing in substance, but not *verbatim*, interrogatories not answered, will be overruled; but if the defen-

dant has submitted to answer, and his further answer is referred back, he is too late to object to the form of the exceptions. *Hodgson v. Butterfield*, 236

3. Where exceptions will lie to a master's report, it must be regularly confirmed before any order can be made upon it. *Scott v. Livesey*, 300

4. It is irregular to obtain one order of reference only, where more than one answer is excepted to. *Allanson v. Moorson*, 478

5. Exceptions cannot be taken to a master's report approving of new trustees, nor will the court interfere with the report of the master where there is no complaint that the persons approved of by him are unfit. *The Attorney General v. Dyson*, 523

## EXECUTOR.

1. An executor or administrator may, after a suit is instituted against him for an account, pay any simple contract or specialty creditor, and will be allowed such payment in passing his accounts. *Maltby v. Russell*, 227

2. Testator gave annuities to his trustees for their trouble in the execution of his will and died possessed of several houses let at weekly rents. The trustees are justified in paying a person to collect these rents, and do not therefore lose their annuities. *Wilkinson v. Wilkinson*, 237

3. Testator directed his real and personal property to be sold and divided amongst his sisters: a power to the executors to sell the real property was implied. *Tylden v. Hyde*, 233

4. A debtor to a testator cannot maintain a bill against the personal representative, to obtain the directions of the court as to the disposal of the money due by him, and to restrain an action brought by the personal representative to recover the debt, on the ground that the debt had been appropriated by the testator for a particular purpose, and that the personal representative intended to apply it for purposes not warranted by the will. *Darthez v. Winter*, 536

5. An executor admitting himself to be a debtor to the testator will be ordered on motion to pay the debt into court. *Rothwell v. Rothwell*, 218

## EXECUTORY DEVISE.

If a tenant of an estate subject to an executory devise pays off a charge upon the estate, and the executory devise afterwards takes effect, his executors will be entitled to be repaid the amount of the charge. *Drinkwater v. Cumbe*, 310

## FORECLOSURE.

Where a mortgagee becomes a bankrupt and a bill of foreclosure is filed against him and his assignees, the court will not, on the application of the assignees alone, make an immediate decree under 7 Geo. 2, c. 20. *Garth v. Thomas*, 128

## HEIR.

Devise of copyhold land in fee upon condition

that the devisee within one month pay 2,000*l.* to the executor, to be applied for charitable purposes, the testator having no customary heir and no next of kin: held that the devisee took the land subject to the payment of the 2000*l.* and that the crown, (and not the lord of the manor,) was entitled to the 2000*l.* by prerogative; if personal estate, because there was no next of kin, and if real estate, because there was no customary heir. *Henchman v. The Attorney General*, 498  
*See CONVERSION*, 1, 2.

## HUSBAND AND WIFE.

1. Husband and wife mortgaged the wife's freeholds for 1000 years, reserving the power to redeem to them or either, and levied a fine to the mortgagee for the term, and subject thereto to the husband in fee: they also surrendered the wife's copyholds to the mortgagee in fee, reserving the power to redeem to the husband and his heirs; the husband afterwards released his equity of redemption as to both estates to the mortgagee in fee; the mortgagee entered into possession, and the husband afterwards died: held that the wife is entitled to redeem the copyholds, but not the freeholds. *Reere v. Hicks*, 403
2. A lady entitled to a fund in court married the day after she came of age. After the marriage, a settlement of her property was made on her and her husband for their lives, and on the children of the marriage, absolutely: but the wife never consented in court to a transfer of the fund to the trustees. After the husband's death and the birth of a child, the settlement was, at the suit of the wife, declared void, because it contained no provision for a second marriage, and because the rights acquired by the husband were, on account of the precipitation of the marriage, a surprise on the wife. *Long v. Long*, 119
3. A suit by husband and wife against the trustees of the latter's separate property cannot be pleaded in bar to a subsequent suit, by her and her next friend, against her trustees and husband although the relief prayed in both suits is the same. *Reere v. Dalby*, 464
4. This court will decree specific performance of an agreement of separation between husband and wife, although the agreement was made on a compromise of indictments preferred by the wife against the husband and others for an assault. *E'worthy v. Bird*, 372

## INCUMBRANCE.

*See EXECUTORY DEVISE. TENANT IN TAIL*, 2.

## INFANT.

1. A lady entitled to a fund in court married the day after she came of age. After the marriage a settlement of her property was made on her and her husband for their lives, and on the children of the marriage, absolutely: but the wife never consented in court to a transfer of the fund to the trustees. After the husband's death and the birth of a child the settlement was, at the suit of the wife, declared void because it contained no provision for the second marriage, and because the rights acquired

by the husband were on account of the precipitation of the marriage, a surprise on the wife. *Long v. Long*, 119

2. Where there are several funds provided by different persons for the maintenance of infants, the interest of the infants must alone determine which of the funds is first applicable. *Foljambe v. Willoughby*, 165  
*See WARD OF COURT*.

## IMPERTINENCE.

1. The bill alleged that a bill of exchange held by the defendant was an accommodation bill, and required him to set forth the particulars of the consideration pretended to be given for it. The answer denied the allegation, and stated that the bill of exchange was paid to the defendant in the regular course of his business as a banker, and that the consideration did not consist of any specific sum, but of cash from time to time drawn out by the payer: held that this was a sufficient answer, and that it would have been impertinent in the defendant to set forth the general banking account. *Webster v. Threlfall*, 190
2. Prolixity in setting forth important documents is not impertinence: therefore where the defendant set forth, verbatim, in his answer, a state of facts and all the affidavits, to show that the demand made in this suit had been disallowed by the master in a former suit, the court held that the answer was not impertinent. *Lnne v. Williams*, 574
3. An order for referring a defendant's examination for impertinence cannot be obtained as of course, if the plaintiff has proceeded on the examination. *Johnstone v. Ure*, 578

## INJUNCTION.

1. Giving a notice of trial is breach of an injunction to stay trial. *Bird v. Branker*, 186
2. It is not necessary for a plaintiff who claims an estate as tenant in tail under the marriage settlement of his father and mother, to prove their marriage by affidavit before he shows cause against dissolving an injunction to restrain an ejectment brought against him to recover the estate. *Hodgson v. Dean*, 221
3. An order for an injunction for want of an answer, obtained after the master has signed his report of the insufficiency of the answer but before the report is filed, is regular. *Wynne v. Jackson*, 226
4. Special injunction granted to stay proceedings in an action in the court of common pleas at Lancaster. *Hine v. Fiddes*, 370
5. Although an injunction is not applied for upon an original bill, yet if the bill is afterwards amended, an injunction will be granted, as of course, upon the defendant taking an order for time to answer the amended bill. *Statham v. Hughes*, 362
6. The common injunction had issued against all the defendants. One of them filed his answer, and then obtained the order nisi to dissolve the injunction, suggesting that all the defendants had answered. the order was discharged for irregularity. *Todd v. Diarm*, 477
7. The plaintiff obtained the common injunction



after four proclamations had been made under an exigent issued in an action commenced against him by the defendant: held that it was a breach of the injunction for the defendant to sue out a writ to compel the sheriff to make the fifth proclamation. *Marsack v. Bailey*, 577

8. An author having sold the copyright of a work published under his own name, and covenanted with the purchaser not to publish any other work to prejudice the sale of it; *semble* that another publisher who had no notice of this covenant, will be restrained from publishing a work subsequently purchased from the same author, and published under his name, on the same subject, and though there be no piracy of the first work. *Barfield v. Nicholson*, 1

### INTEREST.

Where the purchaser upon entering into possession paid the amount of his purchase-money to his banker, and gave notice that he was ready to invest it, in such manner as the vendor should require, but no answer was returned to that notice, and the purchaser, during the investigation of the title, kept in the hands of his banker a balance equal to the amount of the purchase-money, except for four days, when it was a little less; the court held the purchaser not liable for interest, on the difference between his average balance during the period in question, and during the three preceding years. *Winter v. Blades*, 393  
See DEVISE, 5. LEGACY, 9.

### INTERPLEADER.

If an action is brought against an auctioneer for a deposit, he cannot file a bill of interpleader, if he insists upon retaining either his commission or the duty. *Mitchell v. Hayne*, 63

### ISSUE.

The plaintiff represented himself in his bill as entitled to the tithes of the parish of B., without noticing a district called H., which was part of the parish but had of late years been considered as a distinct parish. At the trial of issues as to certain moduses in B., the plaintiff proved that H. was part of B., and that the moduses did not prevail in H. The verdict was however in favor of the moduses. A motion by the plaintiff for a new trial was refused, because the evidence as to H. was a surprise upon the defendant, and was calculated to defeat the intention of the court in directing the issues. *Carrington v. Jones*, 135

### JOINT-STOCK COMPANY.

See ANSWER, 6.

### JURISDICTION.

1. No appeal lies to the court of chancery from decisions, either of the privy council, or the commissioners under the acts and conventions for indemnifying British subjects for the confiscation of their property by the French revolutionary government. *Hill v. Roarson*, 431
2. Funds given by the crown, the legislature or

individuals, for any public or general purpose, are to be administered by courts of equity, as charitable funds, but not where they are derived wholly from rates or assessments under an act of parliament. *Attorney General v. Heelis*, 77, 78

See CHARITY, 1. WARD OF COURT.

### LACHES.

See PARENT AND CHILD.

### LEASE.

A lease was granted to W., who afterwards committed an act of bankruptcy, and then executed a declaration of trust in favor of R.; on the trial of an issue directed by the court, it was found that W.'s name was used in trust for R.: held that the lease did not pass to W.'s assignees. *Gardner v. Rowe*, 346  
See TENANT FOR LIFE, 1.

### LEASE AND RELEASE.

A conveyance by lease and release will operate as an estoppel, and where the releasee can have the benefit of the conveyance at law, by way of estoppel, this court will not interfere in his behalf. *Bensley v. Burdon*, 519

### LEASEHOLDS.

Testatrix devised all her messuages, lands, tenements, hereditaments, and real estate to trustees in trust to sell: held that leaseholds passed to the trustees under the devise of all her messuages, &c. *Dixon v. Dawson. Slewin v. Forside*, 327

See CONSTRUCTION, 2.

### LEGACY.

1. Legacies given to the same persons though by different instruments, and in some instances of different amounts: held to be substitutional. *Gillespie v. Alexander*, 145
2. Legacy charged upon the real estate to vest immediately on the testator's death, but to be paid to the legatee on attaining 21, and the interest to be applied in the mean time for maintenance: the legatee having died before attaining 21, held that the express direction that the legacy should vest on the death of the testator prevents its sinking for the benefit of the devisee, and that the personal representative of the legatee was entitled to the legacy. *Watkins v. Cheek*, 199
3. Residuary bequest to two grand-daughters of testatrix "in trust, till they come of age or marry, the interest to be received in the mean time and paid to them, but if one of them die before marriage or of age, then to the survivor, her child, or children, but should they both die leaving no issue, then I give them power to leave it by will as they shall think fit." One of the legatees married and the other attained 21: held that they both acquired absolute vested interests. *Thackeray v. Hampson*, 214
4. A pecuniary legacy directed to be paid by the sale of an estate which the testator had contracted to purchase, is payable out of the testator's general assets, if the contract cannot be completed. *Fowler v. Willoughby*, 354
5. Bequest to M. on the day of her marriage with

any other person than T., and if she married T., then over. M. married T. in the life-time, and with the consent of the testator held that she was entitled to her legacy. *Smith v. Cowdery*, 358

6. Legacy of 600*l.* to F., and at her death to her two daughters in equal shares, and at their death to their children, one of the daughters having died without children: held that the children of the other daughter did not take the whole 600*l.* but only their mother's share. *Taniere v. Pearkes*, 383

7. Bequest to testatrix's daughter for life, and after her death as she should appoint, and in default of appointment to the testatrix's next of kin to be considered as a vested interest from the testatrix's death, except as to any child afterwards born of her daughter. The daughter having died without having had any child, and without executing any appointment: held that the persons who would be next of kin at the testatrix's death, if her daughter had been then dead without children, were entitled. *Bird v. Wood*, 400

8. Where legacies were charged upon the real estates of a trader, and his devisee and executor sold part of the real estates before the debts were paid: held that the purchaser notwithstanding, 47 Geo. 3, c. 24, was liable to see his purchase-money applied in payment of the legacies. *Horn v. Horn*, 448

9. Legacy to A. as soon as she attains 21 with interest is contingent, and no interest is payable until the legatee attains 21, and then is to be computed from the end of a year after the testator's death. *Knight v. Knight*, 490

10. Bequest of money to trustees upon trust to invest it in the public funds and pay the dividends to A. until her marriage and upon her marriage to transfer the stock to her, but in case she should die unmarried, then to transfer the stock to such person as she should by her will appoint, and, in default of such appointment, to her executors or administrators. Seemable, that she is not entitled to have the fund transferred to her while she remains unmarried. *Wilson v. Mount*, 493

See CONDITION, 1. CONSTRUCTION, 5.

### LEGACY DUTY.

1. A testator resident in India, and having all his property there, bequeathed his residuary estate to H. L., but if she should die before him then to her children. H. L. died before the testator and the executor, who was also resident in India, proved the will there and remitted the residue to his agent in England, with directions to pay it to H. L. or her children. A suit having been instituted by the children, who were infants, against the executor and his agents to have the residue secured: held that the legacy duty was payable upon it, and that administration to the testator ought to have been taken out in this country, and the administrator made a party to the suit. *Logan v. Fairlie*, 284

2. Where a testator dies in India, having personal estate there only, and his executors reside and prove his will there, no duty is payable on a legacy remitted to a legatee in England. *Ibid.*

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### MAINTENANCE.

1. Where there are several funds provided by different persons for the maintenance of infants the interest of the infants must alone determine which of the funds is first applicable. *Foljambe v. Willoughby*, 165

2. By the settlement on the marriage of J. H. with C. R. portions were to be raised for the younger children of J. H. by C. R., or any future wife, but not to be paid until after the decease of J. H., C. R., or such future wife, though no estate was given to such future wife, and power was given to J. H. to appoint the interest of the portions to be raised for the children's maintenance, and on his default the same power was given to the trustees, and the maintenance was directed to be paid on the first quarter day after the decease of the survivor of J. H., C. R. or such future wife. J. H. died leaving his second wife surviving, and by his will, which was not duly attested, directed the maintenance to be raised from the time of his death, and gave other benefits to his eldest son; held that the trustees had no power to allow maintenance during the second wife's life-time, but that the eldest son should be put to his election, as he had other benefits under the will, and was the only party that could be benefited by withholding the maintenance. *Hume v. Rundell*, 174

### MISDEMEANOR.

It is not illegal to compromise indictments for a misdemeanor, *secus* as to indictments for felony. *Elworthy v. Bird*, 372

### MISTAKE.

1. Surveyors appointed to make a partition between tenants in common having by mistake allotted to one of them a piece of land which belonged to him exclusively, and several of the allotments having been sold before the mistake was discovered, the court decreed a pecuniary compensation to be made to him. *Dacre v. Gorges*, 454

2. The lord of a manor being seized of it in fee, subject to an executory devise over, purchased an estate, partly freehold and partly copyhold of the manor, and afterwards, under an enclosure act, carried in two claims, one in respect of the devised, and the other in respect of the purchased estate, and obtained two allotments accordingly; he afterwards died, and the executory devise took effect: held that the copyhold part of the purchased estate being extinguished in the manor, passed with it to the executory devisee, who was also entitled to so much of the allotment obtained in respect of the purchased estate as was proportionate to the value of the copyhold part; and it was referred to the master to apportion the allotment accordingly. *King v. Moody*, 579

### MODUS.

See ISSUE.

### MONEY, PAYMENT OF, INTO COURT.

1. A defendant who had covenanted to pay a

- sum of money to the trustees of his marriage settlement, but had omitted to do so, ordered upon motion in a suit for the performance of the trusts of the settlement to pay the money into court. *Rothwell v. Rothwell*, 217
2. Where the answer contains a clear admission that there is trust moneys in the hands of a defendant, the court will always, on an interlocutory application, order it to be paid into court. *Ibid.*
- See EXECUTOR, 5.

## MONTH.

Where an order allowed the plaintiff a month's time to amend his bill: held that a lunar month was meant. *Cresswell v. Harris*, 476

## MORTGAGE.

1. A reconveyance of a mortgage made in 1745, but not afterwards mentioned in the title deeds, ought to be presumed where no demand of either principal or interest has been made for several years, and the mortgage deeds have been long in the possession of the owner and his ancestors. *Cooke v. Soltau*, 154
2. Where a mortgagee becomes bankrupt, and a bill of foreclosure is filed against him and his assignees, the court will not, on the application of the assignees alone, make an immediate decree under 7 Geo. 2, c. 20. *Garth v. Thomas*, 188
3. Where a legacy is charged upon land and the price of the land is insufficient to pay the legacy, a mortgagee of the devisee of the land shall not be allowed his costs in a suit against him and the devisee for payment of the legacy. *Shackleton v. Shackleton*, 242
4. Where a mortgage deed contains a power of sale, with a direction that the surplus produce shall be paid to the mortgagor, his executors and administrators; if a sale takes place in the lifetime of the mortgagor the surplus is personal estate, but if after death, it is real estate. *Wright v. Rose*, 332
5. Tenant in tail in remainder (after estates to A. for life, and to his first and other sons in tail) pays off a mortgage during the life of the tenant for life, takes an assignment to himself of the mortgage term, and afterwards comes into possession of the estate and dies without issue: the mortgage is a subsisting charge for the benefit of his personal estate, there being no act to show a contrary intention. *Wiggell v. Wiggell*, 364
6. Husband and wife mortgaged the wife's freeholds for 1,000 years, reserving the power to redeem to them, or either of them, and levied a fine to the mortgagee, for the term, and subject thereto to the husband in fee, they also surrendered the wife's copyholds to the mortgagee in fee, reserving the power to redeem to the husband and his heirs; the husband afterwards released his equity of redemption as to both estates to the mortgagee in fee, the mortgagee entered into possession, and the husband afterwards died: held that the wife is entitled to redeem the copyholds, but not the freeholds. *Reese v. Hicks*, 403

## MORTMAIN.

A devise to the British Museum is within the statute of mortmain; and so is every devise for a public purpose, whether local or general. *Trustees of British Museum v. White*, 594

## MULTIFARIOUSNESS.

Demurrer allowed to a bill for a discovery and commissions to examine witnesses in aid of the defence to two separate actions for two separate libels. *Shackell v. Macaulay*, 79

## NEW TRIAL.

See ISSUE.

## NOTICE.

Where it appears that an incumbrancer on an estate in Yorkshire searched the register from a certain date only, it will not be presumed that he had notice of any of the contents prior to that date. *Hodgson v. Dean*, 221

## ORDER.

Where an order allowed the plaintiff a month's time to amend his bill: held that lunar month was meant. *Cresswell v. Harris*, 476

## PARENT AND CHILD.

A tenant for life of real estate, with remainder to his children as he should appoint, remainder to them in fee, entered into an agreement with a creditor, to which his children were parties, that the estate should be immediately sold, and one half of the produce paid to the father, and the other to the children; the father remained in possession for seven years, and then died without having taken any step to carry the agreement into effect: a bill by the personal representative of the creditor against the children and the representative of the father, to have the agreement carried into effect, was dismissed on the ground that the father, by continuing in possession of the estate, deprived his daughters of the benefit of the agreement. *Rhodes v. Cook*, 488

See PORTIONS.

## PARTIES.

1. Bill by three of the partners in a numerous trading company, claiming certain privileges under the articles of copartnership, against the members of the committee for managing the commercial concerns of the company, dismissed, because it was not filed by the plaintiffs on behalf of themselves and the other partners not members of the committee. *Baldwin v. Lawrence*, 18
2. A bill to carry the trusts of a creditor's deed into execution may be filed on behalf of all the creditors by one of them only, where they all executed the deed but were very numerous. *Weld v. Bonham*, 91
3. Demurrer allowed to a bill for the specific performance of an agreement for a lease entered into by the trustees of a numerous company

for the use of the company, because none of the members of the company were parties to the bill. *Douglass v. Horsfall*, 184

4. One of the shareholders of a canal is entitled to file a bill, on behalf of himself and the other shareholders to set aside an agreement made by the commissioners of the canal contrary to the provisions of the act under which the canal was made, because whatever benefits may be reserved to the shareholders by the agreement, they must all be considered as being interested in having the directions of the act complied with. *Gray v. Chaplin*, 267
5. A testator resident in India, and having all his property there bequeathed his residuary estate to H. L., but if she should die before him then to her children. H. L. died before the testator, and the executor, who was also resident in India, proved the will there, and remitted the residue to his agent in England, with directions to pay it to H. L., or her children. A suit having been instituted by the children who were infants, against the executor and his agents to have the residue secured: held that the legacy duty was payable upon it, and that administration to the testator ought to have been taken out in this country, and the administrator made a party to the suit. *Logan v. Fairlie*, 284  
See CHARITY, 2.

#### PARTITION.

See COMPENSATION. COMMISSION, 2.

#### PARTNERSHIP.

1. Bill by three of the partners in a numerous trading company claiming certain privileges under the articles of copartnership, against the members of the committee for managing the commercial concerns of the company, dismissed, because it was not filed by the plaintiffs on behalf of themselves and the other partners not members of the committee. *Baldwin v. Lawrence*, 18
2. Where a partner dies leaving the partnership accounts unsettled, the ecclesiastical court will grant administration of his effects to the surviving partners, or any persons claiming under them if his next of kin decline it. *Cawthorn v. Chalie*, 127

#### PENSION.

The purchaser of a pension granted by his late majesty during pleasure, is not entitled to a pension granted by the present king to the same person and of the same amount, under a new warrant reciting the grant made by his late majesty, which had ceased, though the motive for granting both pensions was the same. *Clay v. St. John*, 32

#### PETITION.

1. The court has no jurisdiction under the 52d Geo. 3. 101, to direct, upon petition, an account of the assets of a person who had received the rents of a charity estate. *In the matter of St. Wenn's Charity*, 66
2. Where a bill is filed merely to obtain a transfer of stock standing in the name of a trustee,

who is out of the jurisdiction of the court, the order must be made at the hearing of the cause, and cannot be obtained by petition. *Burr v. Mason*, 11

#### PLAINTIFF.

See DECREE, 1. WITNESS.

#### PLEA.

1. After plea allowed to part of the bill, the plaintiff cannot amend his bill without a special order to be obtained on notice of motion stating the proposed amendments. *Taylor v. Shaw*, 12
2. After plea of settled account allowed to part of the bill, motion to amend the bill, by stating facts which tended to show that there was no settled account, or that the plaintiff ought to be allowed to surcharge and falsify was refused with costs, because the plaintiff could prove that there was no settled account by taking issue on the plea, and might have amended with a view to surcharge and falsify before the plea was argued. *Ibid*.
3. Plea by husband and wife, entitled as a joint and several plea: held, that the word "several" was mere surplusage, and did not vitiate the plea. *Fitch v. Chapman*, 31
4. A plea may be filed after the return of a simple attachment. *Hamilton v. Hibbert*, 225
5. To a bill by assignees of a bankrupt against a creditor, a plea that the suit was not instituted with the consent of the creditors, at a meeting pursuant to 5th Geo. 2. c. 30. s. 8. was allowed. *Ocklestone v. Benson*, 265
6. To a creditor's bill the defendant pleaded that the deceased was not indebted to the plaintiff at her death, and accompanied the plea by an answer, denying the existence of the debt, and the manner in which it was alleged to have been contracted: held that the answer overruled the plea. *Thring v. Edgar*, 274
7. An answer to a negative plea must be confined to facts specially charged, as evidence of the plaintiff's title. *Ibid*.
8. In a plea of purchase for valuable consideration, without notice, it is enough to deny notice generally in the plea; unless facts are specially charged in the bill, as evidence of notice. *Pennington v. Beechy*, 282
9. A suit by husband and wife against the trustees of the latter's separate property, cannot be pleaded in bar to a subsequent suit by her and her next friend against her trustees and husband, although the relief prayed in both suits is the same. *Reeve v. Dalby*, 464
10. A plea of purchase for valuable consideration, without notice, is no protection against an adverse claim, which the purchaser might have had notice of by using due diligence in investigating the title. *Jackson and wife v. Rowe*, 472
11. Award made under an agreement, entered into after a bill is filed to refer the whole subject matter of the suit to an arbitrator, may be pleaded to the bill. But where all the parties to the suit were not parties to the award, (although the plaintiff was a party to it,) and where a part of the prayer of the bill was for the execution of the trusts of a deed under which some of the parties to the suit were in-

- interested who were not parties to the award, a plea of the award was ordered to stand for an answer, with liberty to except. *Dryden v. Robinson*, 529
12. One of the defendants to a bill by tenant in tail, for redemption of an estate, having put in a plea of a fine levied of part of the estate, averring, that the part included in the fine was the only part of the estate in which the defendant claimed any interest, and accompanied by an answer admitting the possession of title deeds, &c.: held, that the plea was overruled by the answer. *Watkins v. Stone*, 560
- See ANSWER, 4. PLEA, 5, 6, 9.

## PLEADING.

1. Unless a defect in the memorial of an annuity is stated in the pleadings on evidence, no advantage can be taken of it. *Dunn v. Culcraft*, 56
2. Demurrer allowed to a bill for a discovery, and commissions to examine witnesses in aid of the defence to two separate actions, for two separate libels. *Shackell v. Macaulay*, 79
3. An answer as to matters to which the defendant was not alleged to be privy, that they might be true for any thing he knew to the contrary, followed by an averment that he was a stranger to and could not form any belief respecting them, is sufficient. *Amhurst v. King*, 153
4. Demurrer allowed to a bill for the specific performance of an agreement for a lease entered into by the trustees of a numerous company, for the use of the company, because none of the members of the company were parties to the bill. *Douglas v. Horsfall*, 184
5. It is not necessary to pray process against persons who are charged to be out of the jurisdiction of the court. *Haddock v. Thomlinson*, 219
6. To a bill by assignees of a bankrupt by a creditor, a plea that the suit was not instituted with the consent of the creditors at a meeting pursuant to the 5th Geo. 2, c. 30, s. 8, was allowed. *Ockleston v. Benson*, 265
7. One of the shareholders of a canal is entitled to file a bill on behalf of himself and the other shareholders, to set aside an agreement made by the commissioners of the canal contrary to provisions of the act under which the canal was made, because whatever benefits may be reserved to the shareholders by the agreement, they must all be considered as being interested in having the directions of the act complied with. *Gray v. Chaplin*, 267

## PORTIONS.

- A father being tenant for life under his marriage settlement, with power to appoint the shares in which his younger children were to take a sum to be raised for their portions, having exercised the power by his will, afterwards made a provision for one of his daughters, took a release from her other portion, and by a codicil revoked the appointment in his will, so far as it respected her: held, that her share did not sink into the freehold, or belong to his residuary legatee, but that the other younger children were entitled to the whole fund. *Noel v. Lord Walsingham*, 99

## POWER.

- Where a power was to be executed by a will signed and published in the presence of and attested by three witnesses: held, that a will concluding with this declaration, "this is my last will and testament," and expressed to be signed by the testatrix in the presence of three attesting witnesses, was not a good appointment, because the publication was not attested. *Stanhope v. Keir*, 37
- See DEVISE, 4. WILL, 4. REMOTENESS.

## PRACTICE.

1. Where a bill is filed merely to obtain a transfer of stock standing in the name of a trustee who is out of the jurisdiction of the court, the order must be made at the hearing of the cause, and cannot be obtained by petition. *Burr v. Mason*, 11
2. After plea allowed to part of the bill, the plaintiff cannot amend his bill without a special order to be obtained on notice of motion, stating the proposed amendments. *Taylor v. Shaw*, 12
3. After plea of settled account allowed to part of the bill, a motion to amend the bill by stating facts which tended to show that there was no settled account, or that the plaintiff ought to be allowed to surcharge and falsify, was refused with costs, because the plaintiff could prove that there was no settled account by taking issue on the plea, and might have amended with a view to surcharge and falsify before the plea was argued. *Ibid.*
4. Where by mistake sums paid into court under the decree were included in the balances reported due from the defendant, and the decree on further directions ordered those balances to be paid into court: held, that the mistake could not be rectified without rehearing the cause on the latter decree. *Brookfield v. Bradley*, 64
5. Where a decree orders the defendant to retain his costs, when taxed, out of the balance in his hands and pay the residue into court, if the defendant delay to get the costs taxed, the plaintiff must move that he may bring in his bill of costs to be taxed within a limited time, and not that he may pay in the whole balance. *Newsome v. Shearman*, 95
6. A master's report of a receiver's account, like his report upon taxation of costs, does not require confirmation, and cannot be excepted to; but the court will enter into the consideration of objections to the general principle on which the master has proceeded in taking a receiver's account, but not of objections to particular items of it. *Shewell v. Jones*, 170
7. It is not irregular for the defendant's solicitor to be one of the commissioners for taking the answer. *Bird v. Brancker*, 186
8. A defendant who had covenanted to pay a sum of money to the trustees of his marriage settlement, but had omitted to do so, ordered, upon motion in a suit for the performance of the trusts of the settlement, to pay the money into court. *Rothwell v. Rothwell*, 217
9. Where the answer contains a clear admission that there is trust money in the hands of a defendant, the court will always, on an interlocutory application, order it to be paid into court. *Ibid.*

10. Where a schedule written on paper was returned with a commission of partition, the plaintiff's clerk in court was allowed to engross it on parchment, and to file the engrossment with the return, in analogy to the practice where foreign depositions are returned on paper. *Jones v. Totty*, 219
11. If there is only one defendant the bill may be ordered to be taken *pro confesso* on motion. *Lewis v. Marsh*, 220
12. Permission given to defendants after decree to examine a plaintiff as a witness, the master having certified the necessity for so doing, and the plaintiff having no beneficial interest in the property in dispute. *Hougham v. Sandys*, 221
13. It is not necessary for a plaintiff who claims an estate as tenant in tail, under the marriage settlement of his father and mother to prove their marriage by affidavit, before he shows cause against dissolving an injunction to restrain an ejectment brought against him to recover an estate. *Hodgson v. Dean*, 221
14. A plea may be filed after the return of a simple attachment. *Hamilton v. Hibbert*, 225
15. A defendant may file a further answer before the master has signed his report, as to the insufficiency of the first answer. *Wynne v. Jackson*, 226
16. An order for an injunction for want of an answer obtained after the master has signed his report of the insufficiency of the answer, but before the report is filed, is irregular. *Ibid.*
17. Production of an instrument in the plaintiff's possession ordered, upon motion supported by affidavit that the defendant believed the instrument to be forged, and that he could not fully answer the bill before he inspected it. *Jones v. Lewis*, 242
18. Where exceptions will lie to a master's report, it must be regularly confirmed before any order can be made upon it. *Scott v. Livesey*, 300
19. If a bill is filed to set aside a conveyance on the ground of fraud the court will not on motion order a production of the conveyance. *Tyler v. Drayton*, 309
20. A defendant, against whom an attachment had issued for want of an answer, tendered the costs of the contempt and then filed a demurrer; the demurrer was ordered to be taken off the file. *Mellor v. Hall*, 321
21. A second order to dismiss cannot be obtained on the day on which a former order to dismiss is discharged. *Fox v. Morewood*, 325
22. Special injunction granted to stay proceedings in an action in the court of common pleas at Lancaster. *Hine v. Fiddes*, 370
23. A bill of revivor having been filed, but no order to revive obtained, the court ordered the plaintiff to revive within ten days, or both the original bill and bill of revivor to be dismissed. *Bolton v. Bolton*, 371
24. An order obtained by a defendant to a bill of discovery for payment of his costs, is regular, although the plaintiff had previously become bankrupt. *Hibberson v. Fielding*, 371
25. Where a party is in custody of the warden of the fleet under process from the common pleas, and is detained upon an attachment from this court, he must be brought up by *habeas corpus* to the bar of the court, and turned over to the warden of the fleet, before a sequestration can issue. *Const v. Barr*, 452
26. The court will appoint a receiver in India of a testator's assets, on the application of an executor resident in England, but the receiver must give securities resident in England. *Cockburn v. Raphael*, 453
27. The common injunction had issued against the defendants; one of them filed his answer, and then obtained the order nisi to dissolve the injunction, suggesting that all the defendants had answered. The order was discharged for irregularity. *Todd v. Dismor*, 477
28. It is irregular to obtain one order of reference only where more than one answer is excepted to. *Allanson v. Mooroom*, 478
29. If a person who is named as a defendant, but has never been served with a subpoena, or appeared to the bill, appears by counsel at the hearing, and consents to be bound by the decree, the defect is cured. *Capel v. Butler*, 457
30. Where an order allowed the plaintiff a month's time to amend his bill: held that a lunar month was meant. *Creswell v. Harris*, 476
31. A motion for a commission to examine a witness abroad, in aid of an action at law, must be supported by an affidavit stating the name of the witness and the points to which he is to be examined. *Mendizabel v. Machado*, 483
32. The court will not, on motion, order depositions in a tithe cause in the exchequer to be read in a tithe suit in this court, against other occupiers of land in the same parish, though the objects of both suits and the interests of the parties were the same. *Gooderough v. Atway*, 461
33. The time for dismissing the bill for want of prosecution being arrived, and the plaintiff having become bankrupt, ordered that the bill be dismissed without costs, unless the assignee file a supplemental bill within three weeks. *Sharp v. Hullett*, 496
34. Fourteen directors of a joint-stock company, against whom a bill was filed by a shareholder in the company for an account and dissolution of the concern, having filed fourteen separate answers, with long schedules to each, each of the answers and schedules being nearly verbatim the same, and the defendants appearing all by the same solicitor, who had threatened to ruin the plaintiff by the costs of the suit; the court directed a reference to the master, to ascertain whether it was necessary or expedient, with a view to the defence, that separate answers should have been filed. *Vansandau v. Moore*, 509
35. Exceptions cannot be taken to a master's report approving of new trustees, nor will the court interfere with the report of the master, where there is no complaint that the persons approved of by him are unfit. *The Attorney General v. Dyson*, 528
36. The plaintiff obtained the common injunction after four proclamations had been made, under an exigent issued in an action commenced against him by the defendant: held that it was a breach of the injunction for the defendant to sue out a writ to compel the sheriff to make the fifth proclamation. *Marsack v. Bailey*, 577
37. An order for referring a defendant's examina-

tion for impertinence cannot be obtained as of course, if the plaintiff has proceeded on the examination. *Johnstone v. Ure*, 578  
 38. A purchaser who has confirmed his report *inisi*, and then is served with a notice of motion to open the biddings, cannot confirm his report absolutely. *Vansittart v. Collier*, 608  
*See* EXECUTOR, 5. SOLICITOR, 2.

### PREROGATIVE.

Devise of copyhold land in fee, upon condition that the devisee, within one month, pay 2,000*l.* to the executor, to be applied for charitable purposes. The testator having left no customary heir, and no next of kin: held that the devisee took the land subject to the payment of the 2,000*l.*, and that the crown, and not the lord of the manor, was entitled to the 2,000*l.* by prerogative, if personal estate, because there was no next of kin, and if real estate, because there was no customary heir. *Henchman v. Attorney General*, 498

### PRESUMPTION.

A reconveyance of a mortgage made in 1745, but not afterwards mentioned in the title deeds, ought to be presumed where no demand of either principal or interest has been made for several years, and the mortgage deeds have been long in the possession of the owner and his ancestors. *Cooke v. Soltau*, 154

### PRINCIPAL AND AGENT.

Bill to set aside the lease of a farm granted to a steward by his employer, dismissed with costs: although the lease was for a term longer than was usual on the estates, and was granted at the solicitation of the steward, on an agreement made before the subsisting lease had expired and at a rent lower than was offered to the steward on behalf of the occupying tenant; it appearing that the rent to be paid by the steward had been fixed by a surveyor named for that purpose, by the employer, and on a valuation made in the manner usual with that surveyor, and the offer of a higher rent being known to the employer before he executed the lease. *Lord Selcay v. Rhoades*, 41

### PRINCIPAL AND SURETY.

If by neglect of the creditor, the benefit of some of the securities for the debt is lost, the surety is *pro tanto* discharged. *Capel v. Butler*, 457

### PRO CONFESSO.

If there is only one defendant the bill may be ordered to be taken *pro confesso* on motion. *Lewis v. Marsh*, 220

### PUBLIC POLICY.

Where a plaintiff filed his bill for an account of the captain's profits of a voyage to India in one of the company's ships, to a share of which the plaintiff was entitled under an agreement with the captain, and it was alleged by the captain's executors that the agreement was made

in consideration of the plaintiff having procured for the captain the command of the ship, this court directed an issue to ascertain the consideration, reserving the question whether such an agreement would or not be void. *Money v. Macleod*, 301

### PURCHASER.

*See* ANSWER, 4. LEGACY, 8. BIDDINGS. DEVISE, 2. COSTS, 4, 6. PENSION. PLEA, 6, 8. VENDOR AND PURCHASER, 3, 8.

### RECEIVER.

1. Motion for a receiver by one tenant in common, against his co-tenant on the ground that the latter had given notice to the tenants to pay their rents to him only, and had advertised the estate for sale, refused, because the conduct complained of did not amount to an exclusion. *Tyson v. Fairclough*, 142
2. A master's report of a receiver's account, like his report upon taxation of costs, does not require confirmation, and cannot be excepted to; but the court will enter into the consideration of objections to the general principle on which the master has proceeded in taking a receiver's account, but not of objections to particular items of it. *Shewell v. Jones*, 170
3. The court will appoint a receiver in India of a testator's assets on the application of an executor resident in England, but the receiver must give surties resident in England. *Cockburn v. Raphael*, 453

### RECONVEYANCE.

*See* TITLE, 1.

### REFEREE.

Referees may take the opinion of a third person person as evidence, but cannot previously agree to be bound by it. *Hopcraft v. Hickman*, 130

### REGISTER.

Where it appears that an incumbrancer on an estate in Yorkshire searched the register from a certain date only, it will not be presumed that he had notice of any of the contents prior to that date. *Hodgson v. Dean*, 221

### REHEARING.

Where, by mistake, sums paid into court under the decree were included in the balances reported due from the defendant, and the decree on further directions ordered those balances to be paid into court: held that the mistake could not be rectified, without rehearing the cause on the latter decree. *Brookfield v. Bradley*, 64

### RELEASE.

A father lent a sum of money to his son to enable him to engage in trade, and took his promissory note for it, and afterwards persuaded his son to continue the trade against his inclination, whereby the son suffered great losses.

The father on his death-bed caused the promissory note to be burnt and died intestate: held that the burning of the note amounted in equity to a release of the debt, and that the sum which remained due upon it was an advancement to the son. *Gilbert v. Wetherell*, 254

### REMAINDER-MAN.

A trustee of a term for payment of debts purchased the inheritance from the tenant for life and had it conveyed to him by fine and feoffment. The circumstance of the purchaser being trustee does not entitle the remainderman to an account of rents, except from his entry to avoid the fine, nor if he neglects to claim for five years does it prevent his being barred. *Reynolds v. Jones*, 206

### REMOTENESS.

Settlement on husband and wife for their lives, remainder to the sons in tail male, remainder to the daughters in tail, remainder to the survivor of the husband and wife in fee, with the power to the wife if the husband survived, and all the children of the marriage died without issue to charge the estate with 5,000*l.*: held that the power is void for remoteness. *Bristow v. Boothby*, 465

### RENEWAL OF LEASE.

See TENANT FOR LIFE, 1.

### REPORT.

1. A master's report of a receiver's account, like his report upon taxation of costs, does not require confirmation, and cannot be excepted to; but the court will enter into the consideration of objections to the general principle on which the master had proceeded in taking a receiver's account, but not of objections to particular items of it. *Shewell v. Jones*, 170
2. Where exceptions will lie to a master's report, it must be regularly confirmed before any order can be made upon it. *Scott v. Livesey*, 300

See EXCEPTIONS, 5.

### RESIDUE.

Testator directed his residuary estate to be laid out in the purchase of land, as soon as a convenient purchase could be found in the county of York, which upon a fair letting would produce a yearly rent equal to three and half per cent upon the amount of the purchase money, and in the mean time the interest of his residuary estate to be accumulated: the tenant for life will be entitled to the interest of the residuary estate from the end of one year after the testator's death until it is laid out as directed. *Kilvington v. Gray*, 396

### RESTRAINT OF MARRIAGE.

Devise of an estate to trustees upon trust to pay the rents and profits to the testator's son A. while unmarried, and to convey to him in case of his marriage with the consent of the trustees, but in case he should marry against their consent, then to sell the estate, and divide the

proceeds among other persons. The son having married without the knowledge of the trustees, both of whom disapproved of the marriage, when they were informed of it: held that the marriage having been had without the consent of the trustees, though not against their consent, the devise over took effect. *Long v. Ricketts*, 179

See LEGACY, 5.

### REVOCATION.

Testator devised his estates at S. and H. to trustees, in trust, if there should be only one son of D. who should attain twenty-one, for that son, and in case there should be two or more such sons, in trust for the second of them, and gave all the residue of his estates to trustees, in trust to sell. He afterwards drew his pen through the trusts to sell, and by a codicil declared that he intended to erase the direction to sell only: he then gave all his estates to the son of D. who should first attain twenty-one, and change his name to E. D. at the death of the testator had a son who was still an infant, and afterwards had another son: held, that the codicil revoked the devise of the S. and H. estates, and also the devise of the residue of the estates to the trustees; and that D.'s eldest son took under this codicil an immediate vested interest, both in the estates of which the testator was seized at the date of his will and those he purchased afterwards, and consequently was entitled to the rents during his infancy. *Duffield v. Elwes*, 544

### SATISFACTION.

1. A father being tenant for life under his marriage settlement with power to appoint the shares in which his younger children were to take a sum to be raised for their portions, having exercised the power by his will, afterwards made a provision for one of his daughters, took a release from her of her portion, and by a codicil revoked the appointment in his will, so far as it respected her: held that her share did not sink into the freehold, or belong to his residuary legatee, but that the other younger children were entitled to the whole fund. *Noel v. Lord Walsingham*, 99
2. A. being indebted, as his father's executor, to the trustees of his sister's marriage settlement, settled on her and her children a sum to a larger amount in consideration of the natural love and affection he bore them: held that it was not a satisfaction of the debts. *Drewe v. Bidgood*, 424

### SEPARATION.

See HUSBAND AND WIFE, 4.

### SEQUESTRATION.

Where a party is in custody of the warden of the fleet under process from the common pleas, and is detained upon an attachment from this court, he must be brought up by *habeas corpus* to the bar of the court, and turned over to the warden of the fleet before a sequestration can issue. *Const v. Barr*, 452



## SET-OFF.

The directors of a company assigned their salaries and shares to the company, to secure debts due from them on their private accounts, and empowered the company to direct the treasurer to retain the salaries and dividends, and sell their shares for payment of their debts; one of the directors became bankrupt, but the power given to the company had not been exercised, and his shares still remained in his name: held that they passed to his assignees as being in his order and disposition, but that the company had a right to set off against the bankrupt's debt, the dividends and salary due to him at his bankruptcy. *Nelson v. The London Assurance Company*, 292

## SETTLEMENT.

A will directed a settlement to be made of real estate on A, and his first and other sons in tail, with powers of jointuring, leasing, sale and exchange, and all other clauses, powers and provisos usually inserted in settlements of the same kind: held that these last words did not authorize the insertion of a power to charge with portions. *Higginson v. Barneby*, 516  
See INFANT. WARD OF COURT.

## SHIP.

See PUBLIC POLICY.

## SOLICITOR.

1. A bill filed by a solicitor on instructions furnished by the brother-in-law of the plaintiff, without any communication with the plaintiff himself, being dismissed with costs, the solicitor ordered to pay the costs, it appearing that the plaintiff had absconded before the bill was filed. *Hall v. Bennett*, 78
2. Solicitor of a plaintiff, who had no interest in the subject of the suit, ordered to deliver up the papers in the cause to a co-plaintiff, to whom liberty was given to prosecute the suit. *Roulinson v. Hallifax*, 27

## SPECIFIC PERFORMANCE.

1. Bill by a lessee for the specific performance of an agreement for a lease dismissed, because it was not filed until more than two years after the defendant had given notice to the plaintiff of his intention not to perform the contract on account of the latter not having fulfilled it on his part. *Heuphy v. Hill*, 29
2. Two surveyors who it had been agreed should fix the price of an estate, stated in their valuation, the sum to be paid and the quantity of land, and if proved to be less, either 84*l.* or 42*l.* per acre should be deducted, according to the parts of the estate in which the deficiency occurred, but did not state the quantity contained in each part: held that the valuation was uncertain, and that a specific performance could not be enforced. *Hopcraft v. Hickman*, 130
3. Demurrer allowed to a bill for the specific performance of an agreement for a lease, entered into by the trustees of a numerous company for the use of the company, because none

of the members of the company were parties to the bill. *Douglas v. Horsfall*, 184

4. This court will decree specific performance of an agreement for separation between husband and wife, although the agreement was made on a compromise of indictments preferred by the wife against the husband and others for assaults on her. *Elworthy v. Bird*, 372
5. The court will not entertain a bill for the specific performance of an agreement to refer to arbitration, nor substitute the master for the arbitrators. *Agar v. Mackleu*, 418  
See AGREEMENT, 2. VENDOR AND PURCHASER, 9.

## STOCK.

Where a bill is filed merely to obtain a transfer of stock standing in the name of a trustee who is out of the jurisdiction of the court, the order must be made at the hearing of the cause, and cannot be obtained by petition. *Burr v. Mason*, 11

## SUBPENA.

1. Ordered that a defendant, a female infant not baptized, should be described in the subpoena as the youngest female child of the father and mother. *Eley v. Broughton*, 183
2. It is not necessary to pray process against persons who are charged to be out of the jurisdiction of the court. *Haddock v. Thomlinson*, 219
5. If a person who is named as a defendant, but has never been served with a subpoena or appeared to the bill, appears by counsel at the hearing and consents to be bound by the decree, the defect is cured. *Capel v. Butler*,

## SUIT, CONDUCT OF.

See SOLICITOR, 2.

## TENANT FOR LIFE.

1. The reversioner of leaseholds, with the privity of the tenant for life, renewed the lease in his own name, and covenanted to repair the premises: held that he was to be considered as having entered into the covenant on behalf of the tenant for life, and that the latter's estate was liable for dilapidations occasioned by his neglecting to repair. *Marsh v. Wells*, 87
2. Testator directed his residuary estate to be laid out in the purchase of land, as soon as a convenient purchase could be found in the county of York, which upon a fair letting would produce a yearly rent equal to three and a half per cent. upon the amount of purchase money, and in the mean time the interest of his residuary estate to be accumulated: the tenant for life will be entitled to the interest of the residuary estate from the end of one year after the testator's death, until it is laid out as directed. *Kilington v. Gray*, 396

## TENANTS IN COMMON.

See RECEIVER, 1.

## TENANT IN TAIL.

1. Although a fund of which a person is tenant in tail is subject to certain charges, the court

will, under the 39 and 40 Geo. 3. c. 55, order it to be transferred to the tenant in tail, after providing for the charges. *In re Lord Somerville*, 470

2. Tenant in tail in remainder (after estates to A. for life, and to the first and other sons in tail) pays off a mortgage during the life of the tenant for life, takes an assignment to himself of the mortgage term, and afterwards comes into possession of the estate, and dies without issue: the mortgage is a subsisting charge for the benefit of his personal estate, there being no act to show a contrary intention. *Wiggell v. Wiggell*, 364

TIMBER.

Whether the grantor of an annuity charged upon the rents and profits of an estate with the usual demise to a trustee, has a right to cut timber for his own use and profit, the estate being inadequate to the charges upon it? *Qu. Fairfield v. Weston*, 96

TITHES.

See *ISSUE*.

TITLE.

1. A re-conveyance of a mortgage made in 1745, but not afterwards mentioned in the title deeds, ought to be presumed, where no demand of either principal or interest has been made for several years, and the mortgage deeds have been long in the possession of the owner and his ancestors. *Cooke v. Soltau*, 154
2. Where the title to an estate was derived from a person who entered as heir, under the impression that his ancestor's will was void, a purchaser was not compelled to complete his contract, without production of the will, or evidence of its contents. *Stevens v. Guppy*, 439

See *VENDOR AND PURCHASER*, 3, 9.

TITLE DEEDS.

If a vendor retains the title deeds, and covenants for further assurance only, the purchaser may, under that covenant compel him to enter into a covenant for production of the deeds. *Fain v. Ayers*, 533

TRUST.

A lease was granted to W. who afterwards committed an act of bankruptcy, and then executed a declaration of trust in favor of R.; on the trial of an issue directed by the court, it was found that W.'s name was used in trust for R.; held that the lease did not pass to W.'s assignees. *Gardner v. Rowe*, 346

TRUSTEE.

1. A trustee of a term for payment of debts purchased the inheritance from the tenant for life, and had it conveyed to him by fine and feoffment. The circumstance of the purchaser being trustee does not entitle the remainderman to an account of rent, except from his entry, to avoid the fine; nor if he neglects to claim for five years, does it prevent his being barred. *Reynolds v. Jones*, 206

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2. Testator gave annuities to his trustees for their trouble in the execution of his will, and died possessed of several houses, let at weekly rents. The trustees are justified in paying a person to collect these rents, and do not therefore lose their annuities. *Wilkinson v. Wilkinson*, 237

3. Trustee in receipt of the rents and profits of a mortgaged estate, under an old conveyance of the equity of redemption, upon trust to sell and pay off certain debts which had been long since satisfied, is not entitled to redeem the mortgage. *James v. Biou. Owen v. Flack*, 600

TURPIS CONTRACTUS.

A bond for securing a provision for a woman who had been seduced by the obligor, and for her children given after cohabitation determined, is good, notwithstanding the obligor was married when the connection commenced. *Knyes v. Moore*, 260

VENDOR AND PURCHASER.

1. If the master reports against the title to an estate purchased under a decree, the purchaser will be paid the costs of the reference out of the funds in the cause. *Reynolds v. Blake*, 117
2. Two surveyors, who it had been agreed should fix the price of an estate, stated, in their valuation, the sum to be paid and the quantity of land, and, if it proved to be less, either 84l. or 42l. per acre should be deducted according to the parts of the estate in which the deficiency occurred, but did not state the quantity contained in each part: held, that the valuation was uncertain, and that a specific performance could not be enforced. *Hopcraft v. Hickman*, 130
3. Where real estate is devised subject to debts and legacies, and the devisee is also executor, a purchaser or mortgagee from him of the real estate is liable to the charge, if the circumstances of the transaction afford intrinsic evidence that the mortgage or purchase money was not to be applied for the debts or legacies. *Watkins v. Cheek*, 199
4. Where the purchaser upon entering into possession paid the amount of his purchase money to his banker, and gave notice that he was ready to invest it in such manner as the vendor should require, but no answer was returned to that notice, and the purchaser, during the investigation of the title, kept in the hands of his banker a balance equal to the amount of the purchase money, except for four days, when it was a little less: the court held the purchaser not liable for interest on the difference between his average balance, during the period in question and during the three preceding years. *Winter v. Blades*, 393
5. Where the title to an estate was derived from a person who entered as heir, under the impression that his ancestor's will was void, a purchaser was not compelled to complete his contract without production of the will or evidence of its contents. *Stevens v. Guppy*, 439
6. Purchase money paid into court is the property of the vendor. *Gell v. Watson*, 402

7. Where the legacies were charged upon the real estates of a trader and his devisee and executor sold part of the real estates before the debts were paid: held that the purchaser, notwithstanding 47 Geo. 3, c. 74 was liable to see his purchase money applied in payment of the legacies. *Horn v. Horn*, 448
8. A plea of purchase for valuable consideration without notice, is no protection against an adverse claim, which the purchaser might have had notice of by using due diligence in investigating the title. *Jackson and Wife v. Rowe*, 472
9. Specific performance decreed although the vendor's title was founded on the destruction of contingent remainders. *Hasker v. Sutton*, 513
10. If a vendor retains the title deeds, and covenants for further assurance, the purchaser may, under that covenant, compel him to enter into a covenant for production of the deeds. *Fain v. Ayers*, 533
11. A purchaser under a decree is entitled to his costs where the master reports against the title although there is no fund in court. *Smith v. Nelson*, 557

#### WARD OF COURT.

The court retains its jurisdiction over the property of a ward of the court after the ward attains twenty-one, so long as the property remains in court, and, if the ward marries will order a proper settlement to be made, or reform an improper one, unless the ward consents to the settlement either in court or under a commission. *Austen v. Halsey*, 123

#### WASTE.

1. Whether the grantor of an annuity charged upon the rents and profits of an estate with the usual demise to a trustee, has a right to cut timber for his own use and profit, the estate being inadequate to the charges upon it. *Qu. Fairfield v. Weston*, 96
2. The reversioner of leaseholds with the privity of the tenant for life renewed the lease in his own name, and covenanted to repair the premises: held that he was to be considered as having entered into the covenant on behalf of the tenant for life, and that the latter's estate was liable for dilapidations occasioned by his neglecting to repair. *Marsh v. Wells*, 87

#### WILL.

1. To avoid a will for uncertainty, it is not enough that the dispositions in it are so absurd and irrational that it is difficult to believe they could have been intended by the testator, but it must be incapable of any clear meaning. *Mason v. Robinson*, 295
2. Testatrix devised all her messuages, lands, tenements, hereditaments, and real estate to trustees, in trust to sell, and out of the produce to pay her funeral and testamentary expenses and legacies, except her charitable legacies, which she directed to be paid out of her

personal estate legally applicable to that purpose, and not out of any part of her said messuages, lands, &c. which she might die seized or possessed of; and she also directed her trustees to keep separate accounts of the proceeds of her messuages, &c. and of her personal estate legally applicable for charitable purposes, and that, if the proceeds of her messuages, &c. should be insufficient to pay the legacies directed to be paid therewith, the trustees should apply her personal estate in payment of such legacies: held, 1st. that, notwithstanding the personal estate was more than sufficient to pay the charitable legacies, no part of it could be applied to pay the other legacies until the proceeds of the real estate were exhausted: 2d. that the testatrix's leaseholds passed to the trustees under the devise of all her messuages, &c.: 3d. that her heir and next of kin, and not her residuary legatees, were entitled to the surplus proceeds of her freeholds and leaseholds; and, 4th, that the freeholds having been properly sold in the heir's lifetime, the surplus was part of his personal estate. *Dixon v. Dawson. Slavin v. Farnide*, 327

3. Residuary devise of real and personal estate to all the issue, child or children of M. F. as should be alive at the time of the decease of the survivor of two successive tenants for life, equally amongst them, if more than one, to be divided share and share alike, when, and as they should respectively attain the age of twenty-four years, and to their respective heirs, executors, administrators and assigns for ever, as tenants in common: held that the children living at the death of the tenants for life took absolute vested interests in the personal estate as well as in the real estate. *Farmer v. Francis*, 505
4. A will directed a settlement to be made of real estate on A. and his first and other sons in tail, with powers of jointuring, leasing, sale and exchange, and all other clauses, powers and provisions usually inserted in settlements of the same kind: held that these last words did not authorize the insertion of a power to charge with portions. *Higginson v. Barneby*, 516
5. Testatrix directed her legacies to be paid by her executor, to whom she afterwards gave all her real estates, and the residue of her personal estate after payment of her debts and funeral expenses: held that the legacies were not charged on the real estates. *Parker v. Fearney*, 925
6. Held that a second will was made, if not wholly, yet as to the greater part in substitution of the first from the similarity of the form and expressions of the two instruments and of the annuities and legacies, and from the gifts of two estates specifically devised. *Hemming v. Gurrey*, 311

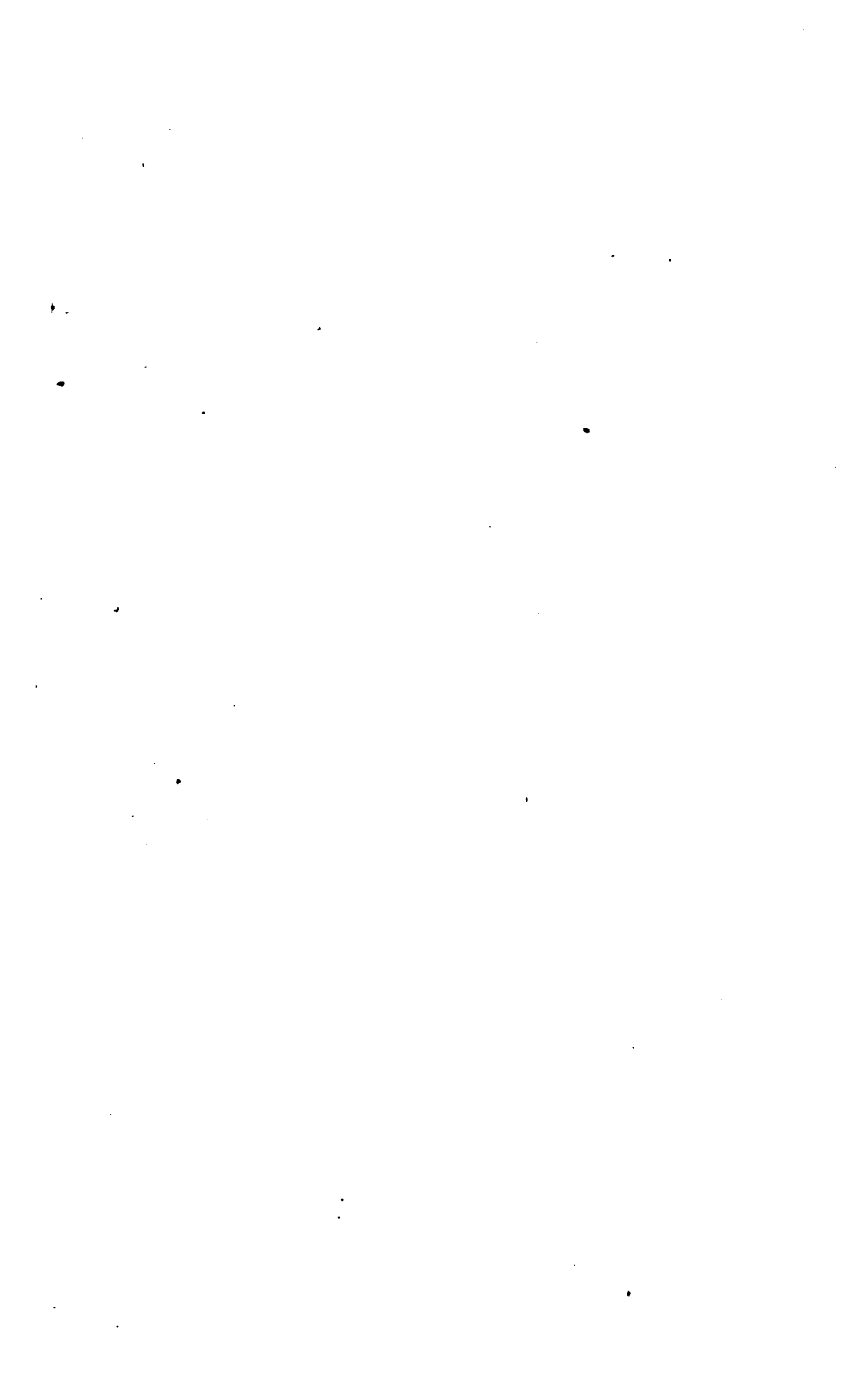
See CONSTRUCTION, 2, 4, 5. DEVISE.

#### WITNESS.

Permission given to defendants, after decree, to examine a plaintiff as a witness, the master having certified the necessity for so doing, and the plaintiff having no beneficial interest in the property in dispute. *Hougham v. Sandys*, 221















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